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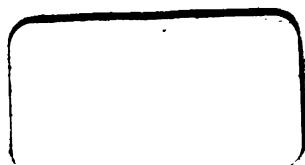
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VOL. 42—HUN. N. Y. SUPREME  
COURT REPORTS.

42	9	42	258	42	538
48	252	115a	562	109a	341
42	22	42	273	110a	487
49	573	108a	1	110a	664
42	27	42	278	42	530
53	582	106a	615	117a	656
42	34	113a	152	42	536
111a	410	42	291	44	369
42	39	115a	139	115a	635
115a	671	42	306	42	549
42	68	53	281	112a	207
42	66	42	310	42	557
42	72	52	285	49	495
115a	1	116a	530	106a	627
42	80	42	347	119a	309
106a	562	118a	662	42	567
42	98	42	353	112a	186
130a	432	44	192	42	571
42	110	55	472	48	582
118a	675	107a	305	115a	539
42	116	42	359	42	581
107a	56	48	412	53	489
42	121	42	363	42	592
114a	622	118a	244	106a	488
42	140	42	376	42	614
51	169	47	487	104a	570
42	161	42	384	42	621
113a	386	46	305	107a	42
42	164	42	398	42	623
48	256	118a	46	111a	466
49	16	42	402	42	638
42	166	51	174	110a	681
110a	668	116a	450	42	647
42	170	42	404	118a	297
43	18	116a	6		
42	173	42	411		
45	306	111a	406		
42	186	42	414		
110a	418	106a	423		
42	202	42	419		
49	421	113a	148		
120a	369	42	434		
42	216	45	4		
116a	662	110a	279		
42	225	42	432		
42	262	111a	577		
115a	579	42	459		
42	222	49	213		
112a	247	118a	305		
42	237	42	465		
55	106	54	423		
42	239	42	470		
106a	265	112a	525		
42	245	42	481		
42	252	113a	391		
46	364	42	486		
46	427	118a	67		
116a	537	42	496		
42	252	45	88		
42	245	42	507		
46	364	51	265		
46	427	52	361		
51	499	113a	198		
52	259	42	529		
55	576	46	347		
55	578	47	251		
117a	319	114a	359		

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4

# REPORTS OF CASES

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OF THE

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*CAUSES in which the decisions contained in these Reports have  
been passed upon by the Court of Appeals.*

	HUN, VOL.	PAGE.
ANDERSON v. GOLDSMIDT.....	38	300
<i>Judgment affirmed: 103 N. Y. 617.</i>		
BAJUS v. SYRACUSE, B. AND N. Y. R. R. Co.....	84	153
<i>Judgment reversed: 103 N. Y. 312.</i>		
BYRNES v. LABAGH.....	38	523
<i>Judgment modified in accordance with opinion, with costs to the appellant to be paid out of the proceeds of the sale: sub. nom. Byrnes v. Stilwell (103 N. Y. 453).</i>		
CONNER v. REEVES.....	35	507
<i>Judgment affirmed: 103 N. Y. 527.</i>		
CRANSTON v. NEW YORK CENTRAL AND HUDSON RIVER R. R. Co....	39	308
<i>Judgment reversed: 103 N. Y. 614.</i>		
DELAFIELD v. SHIPMAN.....	34	514
<i>Judgments of General and Special Terms reversed and judgment entered in accordance with this opinion, the costs of all parties, in the Supreme Court and in this court, to be paid by the trustees out of the surplus income of the trust estate: 103 N. Y. 463.</i>		
DENTON v. SANFORD.....	39	487
<i>(In Court of Appeals, Matter of Denton v. Sanford.)</i>		
<i>Judgment affirmed: 103 N. Y. 607.</i>		
PEOPLE v. ARENSBERG.....	40	356
<i>Judgment reversed: 103 N. Y. 388.</i>		
PHELPS v. BORLAND.....	30	332
	30	366
<i>Judgment affirmed: 103 N. Y. 406.</i>		
RENIHAN v. DENNIN.....	38	270
<i>Judgment affirmed: 103 N. Y. 573.</i>		
WILMERDING v. MCKESSON.....	28	184
<i>Judgment of General Term reversed, and judgment of Special Term modi- fied, in particulars indicated: 103 N. Y. 329.</i>		

The attention of the profession is called to the fact that the Court of Appeals, in many cases, decide an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the General Term does not necessarily show that the Court of Appeals concurred in, or dissented from, the statements contained in the opinion of the Supreme Court.—[REF.]

# A TABLE

## OF THE

### NAMES OF THE CASES REPORTED

#### IN THIS VOLUME.

<b>A</b>		<b>PAGE.</b>	<b>PAGE.</b>
Adair, Kerr v. . . . .	653	Austin, Renton v. . . . .	653
Adams v. Sullivan . . . .	278	Austin, Robbins v. . . . .	469
Adams v. Tator . . . . .	384	Ayres v. Doying . . . . .	630
Adirondack Co., Catlin v. .	658	<b>B.</b>	
Akerley v. Lasher . . . . .	653	Babcock v. Arkenburgh . .	660
Albany County Bank v. Scott,	654	Babcock, Burkhardt v. . .	651
Albert v. Sweet . . . . .	654	Baeder, Cox v. . . . .	657
Aldridge v. Clausen . . . .	473	Bainbridge, Wendling v. .	657
Alford v. Cobb . . . . .	652	Baird v. Richardson . . . .	659
Allen, Buffalo and Grand		Baker, Smith v. . . . .	504
Island Ferry Co. v. . . . .	651	Balcom v. Terwilliger . . .	170
Alny v. McKinney . . . . .	651	Ball v. Evening Post Pub-	
American Society, etc., v. City		lishing Co. . . . .	652
of Cohoes . . . . .	654, 655	Bank of Indianapolis v. Bly .	657
Ames, People ex rel., v. Koch,	658	Bannon v. Cleary . . . . .	657
Anderson v. Davison . . . .	431	Barber, People v. . . . .	27
Andrews, People ex rel.		Barlow, Cronk v. . . . .	655
Haughton v. . . . .	614	Barnard, Matter of Loril-	
Anson, Rogers v. . . . .	436	lard v. . . . .	545
Arkenburgh, Babcock v. . .	660	Barnes, King v. . . . .	657
Armsby, Sherwood v. . . . .	653	Barton v. Govan . . . . .	655
Arnold, Matter of Laird v. .	136	Bates v. Jones . . . . .	659
Ashley, People ex rel., v.		Bates v. McNulty . . . . .	659
Comrs. of Highways . . . .	463	Bauer, Morrison v. . . . .	660
Assessors of Flushing, People		Bauer v. Schevitch . . . .	660
ex rel. Gihon v. . . . .	655	Baxter, Hyland v. . . . .	9
Atherton, Smith v. . . . .	652	Beach v. Knox . . . . .	653
Atkinson v. Bowman . . . .	404	Beard v. Kipp . . . . .	656
Attrill, Huntington v. . . .	459	Becker v. Church . . . . .	258
Attrill, Raht v. . . . .	414	Becker, Church v. . . . .	654
Austin, Matter of . . . . .	516	Becker v. Leonard . . . . .	221

	PAGE.		PAGE.
Beckwith, People v. . . . .	366	Brewster v. Hatch . . . . .	659
Beecher, Hooper v. . . . .	659	Brockway v. Taintor . . . . .	654
Beehler, Matter of . . . . .	651	Broistedt v. Breslin . . . . .	656
Bellman v. N. Y. C. and H. R. R. Co. . . . .	180	Brooklyn City R. R. Co., McClain v. . . . .	657
Bellows, Smith v. . . . .	654	Brooklyn City R. R. Co., Murphy v. . . . .	657
Benedict v. Penfield . . . . .	176	Brooklyn Crosstown R. R. Co., McGlynn v. . . . .	656
Bennett, Mosher v. . . . .	653	Brooklyn Elevated R. R. Co., Clark v. . . . .	655
Berdell v. Hoyt . . . . .	656	Brooklyn and Long Island Cable Ry. Co., Schaper v. . . . .	657
Berdell v. Parkhurst . . . . .	656	Brooks, Haynes v. . . . .	528
Berrick, Brett v. . . . .	652	Brooks, Wyatt v. . . . .	502
Beveridge v. N. Y. Elevated R. R. Co. . . . .	656	Brossell, Tefft v. . . . .	654
Biden v. James . . . . .	654	Brotherson v. Consalus . . . . .	654
Biggs v. Schultz . . . . .	657	Brown, Bowe v. . . . .	660
Bingham v. Marine Nat. Bk., . . . . .	660	Brown v. Gschihay . . . . .	653
Binghamton, City of, Eld- ridge v. . . . .	202	Brown, Morris v. . . . .	656
Bird, Jagger v. . . . .	423	Brown, Voigt v. . . . .	394
Bitter v. Onondaga County Savings Bank . . . . .	653	Brown, Willetts v. . . . .	140
Blaesi v. Blaesi . . . . .	159	Brunnemer, Mead v. . . . .	656
Blatz v. Rohrbach . . . . .	402	Bryan v. Viele . . . . .	657
Bliss, De Kay v. . . . .	659	Bryan v. Wilson . . . . .	657
Bly, Bank of Indianapolis v. . . . .	657	Buchanan, Foy v. . . . .	657
Board of Education, etc., People ex rel. Hoffman v. . . . .	659	Buckhout, Odell v. . . . .	655
Boller, Wright v. . . . .	77	Budington, Freer v. . . . .	655
Borkel v. Mulford . . . . .	658	Buffalo, City of, Fincke v. . . . .	651
Boston, Hoosac Tunnel and W. R. R. Co., Van Horne v. . . . .	654	Buffalo, City of, Foster v. . . . .	651
Bostwick, Burns v. . . . .	656	Buffalo, City of, Union Ceme- tery Association v. . . . .	651
Bowe v. Brown . . . . .	660	Buffalo and Grand Island Ferry Co. v. Allen . . . . .	651
Bowery National Bank v. Mayor, etc. . . . .	659	Bullard, Patton v. . . . .	654
Bowman, Atkinson v. . . . .	404	Burden v. Burden . . . . .	655
Bowman v. Johnston . . . . .	657	Burgess, Dedrick v. . . . .	655
Boyce, White v. . . . .	656	Burhans, Hasbrouck v. . . . .	376
Bradford, Eldred and Cuba R. R. Co. v. N. Y., L. E. and W. R. R. Co. . . . .	499	Burke, Cantwell v . . . . .	655
Breslin, Broistedt v. . . . .	656	Burke v. Mayor, etc. . . . .	660
Brett v. Berrick . . . . .	652	Burkhardt v. Babcock . . . . .	651
Brett v. Brett . . . . .	660	Burns v. Bostwick . . . . .	656
		Burrows, Chadwick v. . . . .	33
		Burton, Evans v. . . . .	652

# TABLE OF CASES REPORTED

vii

	PAGE.		PAGE.
Butler v. Montgomery . . . . .	651	City of Rochester, Jackson v. .	651
Byrnes v. Labagh . . . . .	659	City of Rochester, People ex rel. Cartmill v. . . . .	651
<b>C.</b>		City of Yonkers, Pettengill v. .	655
Caffe, Suan v. . . . .	658	Clark v. Brooklyn Elevated R. R. Co. . . . .	655
Cahen, Meyer v. . . . .	659	Clark v. Clark . . . . .	657
Camp v. Hallanan . . . . .	628	Clark, First National Bank v. .	90
Campbell, Holcomb v . . . . .	398	Clark, First National Bank of Union Mills v. . . . .	16
Cantwell v. Burke . . . . .	655	Clark, People v. . . . .	658
Carlin, People ex rel., v. Supervisors . . . . .	456	Clark, Trustee, etc., Smith v. .	652
Carpenter v. Jones . . . . .	656	Clausen, Aldridge v. . . . .	473
Carroll, People ex rel. Hayes v. . . . .	438	Cleary, Bannon v. . . . .	657
Cartmill, People ex rel., v. City of Rochester . . . . .	651	Clements, People v. . . . .	286, 353
Cassidy v. Gottgetrue . . . . .	658	Clow, Vrooman v. . . . .	654
Casten v. Decker . . . . .	651	Clute v. N. Y. C. and H. R. R. R. Co. . . . .	654
Castner Carbon Co., Sey- mour v. . . . .	658	Cobb, Alford v. . . . .	652
Catlin v. Adirondack Co. . . . .	658	Cobb, Crosley v. . . . .	166
Central Trust Co. v. N. Y. City and N. R. R. Co. . . . .	602, 658	Coe v. Davidge . . . . .	656
Chadwick v. Burrows . . . . .	39	Cohen v. Ellis . . . . .	660
Chaffee v. Goddard . . . . .	147	Cohoes, City of, American Society, etc., v. . . . .	654, 655
Chapin, People ex rel. N. Y. O. and W. Ry. Co. v. . . . .	239	Cohoes, City of, v. Morrison, .	216
Chautauqua Lake Sunday School Assembly, Davis v. . . . .	652	Cohoes, City of, Taylor v. . . . .	654
Childs v. Harris Mfg. Co. . . . .	653	Colby, Martin v. . . . .	1
Chittenden, etc., Matter of . . . . .	659	Cole v. Van Slyke . . . . .	653
Church v. Becker . . . . .	654	Colegrove, Cridler v . . . . .	651
Church, Becker v. . . . .	258	Coleman, People ex rel. Neu- stadt v. . . . .	582
Church v. Schoonmaker . . . . .	225	Collamer, Matter of . . . . .	651
City of Binghamton, Eld- ridge v. . . . .	202	Collins v. Harris . . . . .	651
City of Buffalo, Fincke v. . . . .	651	Collins, Matter of Water Com- missioners of Amsterdam v. . . . .	654
City of Buffalo, Foster v. . . . .	651	Collins v. New York, N. H. and H. R. R. Co. . . . .	657
City of Buffalo, Union Ceme- tery Association v. . . . .	651	Commercial Agency, Kuox v. .	658
City of Cohoes, American So- ciety, etc., v. . . . .	654, 655	Commissioners, People ex rel. Ferrer v. . . . .	560
City of Cohoes v. Morrison, . . . . .	216	Commissioners of Highways, People ex rel. Ashley v. . . . .	463
City of Cohoes, Taylor v. . . . .	654	Congregation Hand in Hand v. Muller . . . . .	653

	PAGE.		PAGE.
Conley, People ex rel. Peck v.	98	Dayton, Elting v.	659
Consalus, Brotherson v.	654	Decker, Casten v.	651
Continental National Bank v.		Dedrick v. Burgess	655
Koehler	659	Deerpark, Town of, Ivory v.	656
Cook, Underwood v.	651	De Kay v. Bliss	659
Cooke v. Lalance-Grosjean		Delaware and Hudson Canal	
Company	656	Co., Cunliff v.	654
Cooper, People ex rel. Mil-		Delaware and Hudson Canal	
ler, v.	196	Co., Draper v.	654
Cooper, People ex rel., v. Reg-		Delaware and Hudson Canal	
ister, etc.	656	Co., Tisdale v.	654
Corbett v. Twenty-third St.		Delaware, Lackawanna and	
Ry. Co.	587	Western R. R. Co., Wall v.	653
Corn Exchange Bank v. Farm-		Dempsey, Thayer v.	659
ers' Nat. Bank	659	Deobold v. Oppermann	659
Cornell, Surdam v.	653	Deverell, People ex rel. v.	
Cortland, Village of, Fisher v.	173	Musical Protective Union	656
Covert, Locke v.	484	Dewey, Vandervoort v.	68
Cowdrey v. Ely	659	Dickerson v. Gordon	657
Cowper v. Theall	660	Dimick, People v.	652
Cox v. Baeder	657	Dodge v. Havemeyer	659
Cox, Jessup & Moore Paper		Dodge, Reilly v.	646
Co. v.	659	Dorr, People ex rel., v. Thacher	349
Craig, Robinson Consolidated		Doty v. Stanton	652
Mining Co. v.	659	Dougherty, Fisher v.	167
Crawford, McCormick v.	657	Doughty v. Doughty	654
Cridler v. Colegrove	651	Downing, Rundell v.	652
Cronk v. Barlow	651	Doying, Ayres v.	630
Crooks, Pierson v.	571	Doyle v. Rector, etc., Trinity	
Crosby v. Cobb	166	Church	657
Crouse, Kent v.	653	Draper v. D. and H. Canal Co.	654
Cunliff v. D. and H. Canal Co.	654	Duden, Matter of	660
Curtis, Munger v.	465	Duel v. Getman	655
		Duffy, Ross v.	655
<b>D.</b>		Dumar, People v.	80
Darrow v. Family Fund		Duntley v. Davis	229
Society	245	Dusty v. Lansing	654
Davidge, Coe v.	656		
Davis v. Chautauqua Lake		<b>E.</b>	
Sunday School Assembly	652	Eaton v. Wilcox	61
Davis, Duntley v.	229	Edsall, Reed v.	659
Davison, Anderson v.	431	Eggleston, Ithaca Agricul-	
Day v. Ogdensburgh and Lake		tural Works v.	653
Champlain R. R. Co.	654	Eickhorn, Merchant v.	658



# TABLE OF CASES REPORTED.

ix

	PAGE.		PAGE.
Eisner, O'Shea v. . . . .	658	Fillmore, Gorham v. . . . .	651
Eldridge v. City of Bing-		Fincke v. City of Buffalo . . . . .	651
hamton . . . . .	202	Finnern v. Hinz . . . . .	658
Eldridge v. Smith . . . . .	651	First National Bank v. Clark, . . . . .	90
Electrical Supply Co. v. Jer-		First National Bank, Naser v. . . . .	658
sey City Electric Light Co. . . . .	659	First National Bank of Union	
Elliott, Matter of . . . . .	655	Mills v. Clark . . . . .	16
Elliott, Third National Bank		Fisher v. Dougherty . . . . .	167
v. . . . .	121	Fisher v. Martin . . . . .	656
Ellis, Cohen v. . . . .	660	Fisher v. Village of Cortland, . . . . .	173
Ellis v. Sharp . . . . .	179	Flack, Leach v. . . . .	659
Elting v. Dayton . . . . .	659	Flack, People ex rel. Lock-	
Ely, Cowdrey v. . . . .	659	man v. . . . .	659
Ely v. Taylor . . . . .	205	Forstman v. Shulting . . . . .	643
Emery, Phelps v. . . . .	652	Foster v. City of Buffalo . . . . .	651
Emmons, Morris v. . . . .	659	Foy v. Buchanan . . . . .	657
Enyard v. Smith . . . . .	658	Frankel v. Hays . . . . .	93, 651
Equitable Life Association,		Frankel, Wright v. . . . .	653
Mayor v. . . . .	237	Frear v. Sweet . . . . .	657
Evans v. Burton . . . . .	652	Freelove, Mather v. . . . .	651
Evening Post Publishing Co.,		Freeman v. National Benefit	
Ball v. . . . .	652	Society . . . . .	252
Everett, Wakeman v. . . . .	659	Freer v. Budington . . . . .	655
Everhardt, People v. . . . .	659	French v. Kenworthy . . . . .	654
Everson v. McMullen . . . . .	369	French v. Powers . . . . .	651

## F.

Fales, Morris v . . . . .	654
Fall Brook Coal Co. v. Heck-	
sher . . . . .	534
Family Fund Society, Dar-	
row v. . . . .	245
Farmers' Nat. Bank, Corn Ex-	
change Bank v. . . . .	659
Farwell v. Griffin . . . . .	652
Faulkner, Hammond v. . . . .	652
Fay v. Hebbard . . . . .	490
Feeks, Matter of . . . . .	655
Feeney v. Long Island R. R.	
Co. . . . .	657
Ferrer, People ex rel., v. Com-	
missioners . . . . .	560
Ferris v. Plummer . . . . .	440
Feuschter, Gilligan v. . . . .	651

## G.

Gaines, White v. . . . .	657
Gallatin Nat. Bank v. Nash-	
ville, C. and St. L. Ry. Co. . . . .	660
Gardner, Klumpp v. . . . .	658
Garner, Thorn v. . . . .	507
Gaskell, McCarragher v. . . . .	451
Gay v. Lathrop . . . . .	653
General Synod of Ref. Church	
v. Lincoln . . . . .	658
Genet v. Hunt . . . . .	660
Germania Life Insurance Co.	
v. Meagher . . . . .	659
Getman, Duel v. . . . .	655
Gignoux v. Stafford . . . . .	426
Gihon, People ex rel., v.	
Assessors of Flushing . . . . .	655
Gilboa, Snow v. . . . .	658

## TABLE OF CASES REPORTED.

	PAGE.		PAGE.*
Gile, Thayer v. . . . .	268	Hancock Mutual Life Ins. Co.	
Gillen, People ex rel., v.		v. Loewenberg . . . . .	659
Wolfert . . . . .	656	Hardenbrook, Meegan v. . . . .	657
Gilligan v. Feuschter . . . . .	651	Harris, Collins v. . . . .	651
Goddard, Chaffee v. . . . .	147	Harris, Thornton v. . . . .	655
Gold and Stock Telegraph		Harris Mfg. Co., Childs v. . . . .	653
Co., Smith v. . . . .	454	Hart v. Hazzard . . . . .	209
Goodrich v. N. Y. C. and H.		Hasbrouck v. Burhans . . . . .	376
R. R. Co. . . . .	655	Hasbrouck, Van Etten v. . . . .	654
Goodrich, Tilley v. . . . .	656	Haskin, Slattery v. . . . .	86
Gordon, Dickerson v. . . . .	657	Hatch, Brewster v. . . . .	659
Gordon v. Niemann . . . . .	656	Hatch v. Stewart . . . . .	164
Gorham v. Fillmore . . . . .	651	Haug v. Reissner . . . . .	658
Gottgetrue, Cassidy v. . . . .	658	Haughton, People ex rel., v.	
Gould, Knickerbacker v. . . . .	660	Andrews . . . . .	614
Govan, Barton v. . . . .	655	Havemeyer, Dodge v. . . . .	659
Grand Trunk Ry. Co., Nea-		Hayes, People ex rel., v. Car-	
lon v. . . . .	651	roll . . . . .	438
Graves, Roberts v. . . . .	659	Hayes v. Rabold . . . . .	659
Gray, Matter of . . . . .	411	Haynes v. Brooks . . . . .	528
Gray v. Wolcott . . . . .	653	Haynes, Spring v. . . . .	528
Great Western Ins. Co., Mur-		Hays, Frankel v. . . . .	93, 651
ray v. . . . .	660	Hays, Thalheimer v. . . . .	93, 651
Greenbush, Village of, Parr v.	232	Hayward, Hood v. . . . .	657
Greenbush, Village of, Wilt-		Hazard, Thompson v. . . . .	655
sie v. . . . .	654	Hazzard, Hart v. . . . .	209
Greenley, Le Count v. . . . .	655	Heath, Yates v. . . . .	652
Greenwood v. Holbrook . . . . .	633	Hebbard, Fay v. . . . .	490
Gridley, Nelson v. . . . .	657	Hecksher, Fall Brook Coal	
Griffin, Farwell v. . . . .	652	Co. v. . . . .	534
Gschihay, Brown v. . . . .	653	Henderson, Hogan v. . . . .	659
Gubner v. Vick . . . . .	657	Hill v. Woolsey . . . . .	481
		Hines, Matter of . . . . .	659
<b>H.</b>		Hinkley v. Troy and Albia	
Haack v. Weioken . . . . .	486	R. R. Co. . . . .	281
Hadden, Thorne v. . . . .	654	Hinz, Finner v. . . . .	658
Hake, Matter of Lewis v. . . . .	542	Hoffman, People ex rel., v.	
Hall v. Hall . . . . .	656	Board of Education, etc. . . . .	659
Hallanan, Camp v. . . . .	628	Hoffman, Taber v. . . . .	652
Halpin v. Phoenix Ins. Co. . . . .	655	Hoffmann v. Steinan . . . . .	659
Halstead v. Sherrill . . . . .	657	Hogan v. Henderson . . . . .	659
Hamburger v. Moeller . . . . .	660	Hogan v. Ryan . . . . .	654
Hamlin v. Wheelock . . . . .	530	Holbrook, Greenwood v. . . . .	633
Hammond v. Faulkner . . . . .	652	Holcomb v. Campbell . . . . .	398

## xi

Digitized by Google

	PAGE.		PAGE.
Koehler, Continental National		Long Island R. R. Co., Feeney	
Bank v. . . . .	659	v. . . . .	657
Kopelowich, Holt v. . . . .	653	Long Island R. R. Co., Jour-	
Koush v. Ketzlik . . . . .	659	dan v. . . . .	657
Kowing, Hudson v. . . . .	655	Lorillard v. Barnard, Matter	
Kreischer v. Vetter . . . . .	654	of . . . . .	545
Kroll, Wood v. . . . .	658	Lott, Hopkins v. . . . .	442
Krotel v. Williams . . . . .	658	Lott, People ex rel. Stevens v.	408
Kurtz, People v. . . . .	335	Lubricating Oil Co. v. Stand-	
Kuykendall, Knee v. . . . .	656	ard Oil Co. . . . .	153
		Ludlow v. Mead . . . . .	656
<b>L.</b>			
Labagh, Byrnes v. . . . .	659	<b>M.</b>	
Laird, Matter of, v. Arnold .	136	Mack, Rothschild v. . . . .	72
Lalanc-Grosjean Company,		Madge v. Madge . . . . .	524
Cooke v. . . . .	656	Mairs, Murphy v. . . . .	657
Lansing, Dusty v. . . . .	654	Malloy v. Town of Pelham .	655
Lasher, Akerley v. . . . .	653	Mangam v. Peck . . . . .	655
Lasher, McKay v. . . . .	270	Manktelow v. Lilly . . . . .	651
Lathrop, Gay v. . . . .	653	Manne, Weber v. . . . .	557
Lawrence v. Saratoga Lake		Manning v. Sweeting . . . . .	655
Railway Co. . . . .	655	Mansfield Silk and Thread	
Leach v. Flack . . . . .	659	Co., National Thread Co. v.	659
Le Count v. Greenley . . . . .	655	Manwarring, Howell v. . . . .	652
Leonard, Becker v. . . . .	221	Marcile v. Saltzman . . . . .	655
Lester, McLaughlin v. . . . .	657	Marine National Bank, Bing-	
Levy v. Moeller . . . . .	660	ham v. . . . .	660
Lewis v. Hake, Matter of . .	542	Martin v. Colby . . . . .	1
Lewis v. Merritt . . . . .	161	Martin, Fisher v. . . . .	656
Lewisohn v. Niederwiesen .	658	Martin v. Rothschild . . . . .	410
Libbey v. Mason . . . . .	470	Martin, Terwilliger v. . . . .	653
Lilly, Manktelow v. . . . .	651	Mason, Libbey v. . . . .	470
Lincoln, General Synod Ref.		Mather v. Freelove . . . . .	651
Church v. . . . .	656	Matter of Austin . . . . .	516
Landeman v. N. Y. C. and H.		Matter of Beehler . . . . .	651
R. R. Co. . . . .	306	Matter of Chittenden, etc. .	659
Lindner v. McBride . . . . .	652	Matter of Collamer . . . . .	651
Lindsay, Silvey v. . . . .	116	Matter of Duden . . . . .	660
Livingston v. Livingston . .	654	Matter of Elliott . . . . .	655
Locke v. Covert . . . . .	484	Matter of Feeks . . . . .	655
Lockman, People ex rel., v.		Matter of Gray . . . . .	411
Flack . . . . .	659	Matter of Hines . . . . .	659
Loewenberg, Hancock Mutual		Matter of Hunt . . . . .	434
Life Ins. Co. v. . . . .	659	Matter of King . . . . .	607

# TABLE OF CASES REPORTED.

xiii

	PAGE.		PAGE.
Matter of Laird v. Arnold . . . . .	136	McInerney, People v. . . . .	659
Matter of Lewis v. Hake . . . . .	542	McIntire, Neidlinger v. . . . .	658
Matter of Lorillard v. Barnard . . . . .	545	McKay v. Laaher . . . . .	270
Matter of New York District Ry. Co. . . . .	621	McKinney, Alny v. . . . .	651
Matter of New York, L. and W. Ry. Co. . . . .	652	McLaughlin v. Lester . . . . .	657
Matter of Nichols . . . . .	658	McMaster v. Smith . . . . .	652
Matter of Page . . . . .	660	McMullen v. Everson . . . . .	369
Matter of Piffard . . . . .	34	McNulty, Bates v. . . . .	659
Matter of Place . . . . .	658	Mead v. Brunnemer . . . . .	656
Matter of Raber . . . . .	656	Mead, Ludlow v. . . . .	656
Matter of Spring . . . . .	652	Mead, Southerland v. . . . .	656
Matter of State Reservation at Niagara . . . . .	652	Meade v. Tuckerman . . . . .	656
Matter of Van Dermoore . . . . .	326	Meagher, Germania Life Ins. Co. v. . . . .	659
Matter of Van Horne . . . . .	653	Meegan v. Hardenbrook . . . . .	657
Matter of Water Commission- ers of Amsterdam v. Collins, . . . . .	654	Mendel v. Mendel . . . . .	660
Matter of Wells . . . . .	656	Merchant v. Eickhorn . . . . .	658
Matter of Will of Morgan . . . . .	655	Merchants' National Bank, Hubbell v. . . . .	200
Matter of Willets . . . . .	658	Merrick v. Kirk . . . . .	653
Maxwell v. Inman . . . . .	265	Merritt, Lewis v. . . . .	161
Mayer v. Equitable Life Asso- ciation . . . . .	237	Merritt v. Merritt . . . . .	652
Mayor, etc., Bowery National Bank v. . . . .	659	Metropolitan Elevated Rail- way Co., Pond v. . . . .	567
Mayor, etc., Burke v. . . . .	660	Metropolitan Life Ins. Co., McGrath v. . . . .	655
Mayor, etc., Kingsland v. . . . .	599	Metropolitan Life Ins. Co. Stirling v. . . . .	656
Mayor, etc., Starin v. . . . .	549	Meyer v. Cahen . . . . .	659
McBride v. McBride . . . . .	658	Milk v. Wait . . . . .	651
McBride, Lindner v. . . . .	652	Millard, Taylor v. . . . .	363
McCarragher v. Gaskell . . . . .	451	Miller, People ex rel., v. Cooper . . . . .	196
McClain v. Brooklyn City R. R. Co. . . . .	657	Miller, Phoenix Mills v. . . . .	654
McClure v. N. Y. C. and H. R. R. Co. . . . .	654	Mittnacht v. Wolf . . . . .	657
McCormick v. Crawford . . . . .	657	Moeller, Hamburger v. . . . .	660
McDougall v. Nast . . . . .	652	Moeller, Levy v. . . . .	660
McGlynn v. Brooklyn Cross- town Railroad Co. . . . .	656	Montgomery, Butler v. . . . .	651
McGrath v. Metropolitan Life Ins. Co. . . . .	655	Moog v. Kehoe . . . . .	494
McGrath, People v. . . . .	659	Moore v. Rochester and Onta- rio Belt Ry. Co. . . . .	651
		Moore v. Taylor . . . . .	45, 651
		Morgan, Matter of Will of . . . . .	655
		Morris v. Brown . . . . .	656

	PAGE.		PAGE.
Morris v. Emmons . . . . .	659	Nelson v. Gridley . . . . .	657
Morris v. Fales . . . . .	654	Neustadt, People ex rel, v. Coleman . . . . .	582
Morris v. Jones . . . . .	653	Newcomb, Signer v. . . . .	655
Morris and Essex R. R. Co., Muldowney v. . . . .	444	New York Central and H. R. R. R. Co., Bellman v. . . . .	130
Morrison v. Bauer . . . . .	660	New York Central and H. R. R. R. Co., Clute v. . . . .	654
Morrison, City of Cohoes v. . . . .	216	New York Central and H. R. R. R. Co., Goodrich v. . . . .	655
Mosher v. Bennett . . . . .	653	New York Central and H. R. R. R. Co., Lindeman v. . . . .	306
Muldowney v. Morris and Essex R. R. Co. . . . .	444	New York Central and H. R. R. R. Co., McClure v. . . . .	654
Mulford, Borkel v. . . . .	658	New York Central and H. R. R. R. Co., Odell v. . . . .	655
Mulford, Smith v. . . . .	347	New York City and N. R. R. Co., Central Trust Co. v. . . . .	602, 658
Muller, Congregation Hand- in-Hand v. . . . .	658	New York District Ry. Co., Matter of . . . . .	621
Munger v. Curtis . . . . .	465	New York Elevated R. R. Co., Beveridge v. . . . .	656
Munoz v. Wilson . . . . .	656	New York, L. and W. Ry. Co., Matter of . . . . .	652
Murphy v. Brooklyn City R. R. Co. . . . .	657	New York, L. E. and W. R. R. Co., Bradford, Eldred and Cuba R. R. Co. v. . . . .	496
Murphy v. Mairs . . . . .	657	New York, L. E. and W. R. R. Co., Hoyt v. . . . .	657
Murray v. Great Western Ins. Co. . . . .	660	New York, L. E. and W. R. R. Co., Tonawanda Valley and Cuba R. R. Co. v. . . . .	496
Murray, Kernochan v. . . . .	660	New York, N. H. and H. R. R. Co., Collins v. . . . .	657
Musical Protective Union, People ex rel. Deverell v. . . . .	656	New York, N. H. and H. R. R. Co., Myles v. . . . .	656
Mutual Relief Soc., Payne v. . . . .	655	New York, Ontario and W. Ry. Co., People ex rel, v. Chapin . . . . .	239
Myles v. New York, New Haven and Hartford R. R. Co. . . . .	656	New York, Ontario and W. R. R. Co., Hunter v. . . . .	657
<b>N.</b>		Niagara, Matter of State Reservation at . . . . .	652
Naser v. First Nat. Bank . . . . .	658		
Nashville, C. and St. L. Ry. Co., Gallatin Nat. Bank v. . . . .	660		
Nashville, C. and St. L. Ry. Co., Wehrhane v. . . . .	660		
Nast, McDougal v. . . . .	652		
National Benefit Soc., Free- man v. . . . .	252		
National Thread Co. v. Mans- field Silk and Thread Co. . . . .	659		
National Tradesmans' Bank v. Wetmore . . . . .	359		
Nealon v. Grand Trunk Ry. Co. . . . .	651		
Neidlinger v. McIntire . . . . .	658		

## TABLE OF CASES REPORTED.

xv

	PAGE.		PAGE.
Nichols, Matter of . . . . .	658	Pennsylvania Company, Pal-	
Nicoll, People ex rel., v. Infant		mer v. . . . .	656
Asylum . . . . .	658	People v. Barber . . . . .	27
Niederwiesen, Lewisohn v. . . . .	658	People v. Beekwith . . . . .	366
Niemann, Gordon v. . . . .	656	People v. Clark . . . . .	658
North-Western Mut. Life Ins.		People v. Clements . . . . .	286, 353
Co. v. Phelan . . . . .	419	People v. Dimick . . . . .	652
Norton v. Keogh . . . . .	611	People v. Dumar . . . . .	80
O.		People v. Everhardt . . . . .	659
O'Brien, Wiswall v. . . . .	654	People v. John D. Locke Co. . . . .	484
Odell v. Buckhout . . . . .	655	People v. Johnson . . . . .	653
Odell v. New York Central		People v. Kibler . . . . .	652
and H. R. R. R. Co. . . . .	655	People v. King . . . . .	186
O'Dougherty v. Remington		People v. Kurtz . . . . .	335
Paper Co. . . . .	192	People v. McGrath . . . . .	659
Ogdensburgh and Lake Cham-		People v. McInerney . . . . .	659
plain R. R. Co., Day v. . . . .	654	People v. Olney . . . . .	652
Olcott, Root v. . . . .	536	People v. O'Sullivan . . . . .	653
Olean, Village of, v. King . . . . .	651	People v. Parr . . . . .	313
Olney, People v. . . . .	652	People v. Pearsall . . . . .	658
Onondaga County Savings		People v. Penhollow . . . . .	103
Bank, Bitter v. . . . .	653	People v. Stott . . . . .	660
Oppermann, Deobold v. . . . .	659	People v. Thorn . . . . .	658
O'Shea v. Eisner . . . . .	658	People v. Titus . . . . .	658
O'Sullivan, People v. . . . .	653	People v. Universal Life Ins.	
P.		Co. . . . .	616, 656
Pace Tobacco Co., Weller v. . . . .	659	People ex rel. Ames v. Koch, . . . . .	658
Page, Matter of . . . . .	660	People ex rel. Ashley v. Com-	
Palmer v. Pennsylvania Com-		missioners of Highways . . . . .	463
pany . . . . .	656	People ex rel. Carlin v. Super-	
Palmer, Preston v. . . . .	384	visors . . . . .	456
Parkhurst, Berdell v. . . . .	656	People ex rel. Cartmill v. City	
Parr, People v. . . . .	313	of Rochester . . . . .	651
Parr v. Village of Greenbush, . . . . .	232	People ex rel. Cooper v. Reg-	
Patton v. Bullard . . . . .	654	ister, etc. . . . .	656
Payne v. Mutual Relief Soc. . . . .	655	People ex rel. Deverell v.	
Pearsall, People v. . . . .	658	Musical Protective Union, . . . . .	656
Peck, Mangam v. . . . .	655	People ex rel. Dorr v. Thacher, . . . . .	349
Peck, People ex rel. v. Conley, . . . . .	98	People ex rel. Ferrer v. Com-	
Peet v. Kent . . . . .	653	missioners . . . . .	560
Pelham, Town of, Malloy v. . . . .	655	People ex rel. Gihon v. Asses-	
Penfield, Benedict v. . . . .	176	sors of Flushing . . . . .	655
Penhollow, People v. . . . .	103	People ex rel. Gillen v. Wol-	
		fert . . . . .	656





## TABLE OF CASES REPORTED.

xvii

	PAGE.		PAGE.
Roberts v. Graves . . . . .	659	Scott, Albany County Bank	
Robinson Consolidated Min-		v. . . . .	654
ing Co. v. Craig . . . . .	659	Scoville v. Shed . . . . .	653
Roche v. Roche . . . . .	652	Seibold, Stevens v. . . . .	653
Rochester, City of, Jackson v.	651	Settle, Zimmer v. . . . .	653
Rochester, City of, People ex		Seymour v. Castner Carbon	
rel. Cartmill v. . . . .	651	Co. . . . .	658
Rochester City and Brighton		Seymour, Sanger v. . . . .	641, 660
R. R. Co. v. Stahley . . . . .	652	Sharp, Ellis v. . . . .	179
Rochester and Ontario Belt		Shear, Watrous v. . . . .	653
Railway Co. Moore v. . . . .	651	Shed, Scoville v. . . . .	653
Rockwell v. Reed . . . . .	651	Sherman, Stearns v. . . . .	659
Rogers v. Anson . . . . .	436	Sherrill, Halstead v. . . . .	657
Rogers, Smith v. . . . .	110	Sherwood, v. Armsby . . . . .	658
Rohrback, Blatz v. . . . .	402	Shiner v. Russell . . . . .	656
Root v. Olcott . . . . .	536	Siedenbach v. Riley . . . . .	656
Ross v. Duffy . . . . .	655	Signer v. Newcomb . . . . .	655
Ross, Sweet v. . . . .	655	Silvey v. Lindsay . . . . .	116
Rotchschild v. Mack . . . . .	72	Singleton v. Smith . . . . .	652
Rothschild, Martin v. . . . .	410	Sinkler, People ex rel., v.	
Rundell v. Downing . . . . .	652	Terry . . . . .	273
Russell, Shiner v. . . . .	656	Skinner, Pulver v. . . . .	322
Russell Coe Fertilizing Co.,		Slattery v. Haskin . . . . .	86
Snow v. . . . .	658	Smith v. Atherton . . . . .	652
Ryan, Hogan v. . . . .	654	Smith v. Baker . . . . .	504
		Smith v. Bellows . . . . .	654
<b>S.</b>		Smith v. Clark Trustees, etc.	652
Saltzman, Marcile v. . . . .	655	Smith, Eldridge v. . . . .	651
Sanger v. Seymour . . . . .	641, 660	Smith, Enyard v. . . . .	658
Sanger v. Waterbury . . . . .	657	Smith v. Gold and Stock Tele-	
Saratoga Lake Railway Co.,		graph Co. . . . .	454
Lawrence v. . . . .	655	Smith, McMaster v. . . . .	652
Sargent, Kelsey v. . . . .	652	Smith v. Mulford . . . . .	347
Schaghticoke, Village of,		Smith, Redlich v. . . . .	658
Prendergast v. . . . .	317	Smith v. Rogers . . . . .	110
Schaper v. Brooklyn and Long		Smith, Singleton v. . . . .	652
Island Cable Railway Co. . . . .	657	Smith v. Tozer . . . . .	22
Schenck v. Ringler . . . . .	655	Snow v. Gilboa . . . . .	658
Schevitch, Bauer v. . . . .	660	Snow v. Russell Coe Fertilizer	
Schleier, Van Orden v. . . . .	656	Co. . . . .	658
Schoonmaker, Church v. . . . .	225	Southerland v. Mead . . . . .	656
Schoonmaker v. Kelly . . . . .	299	Southwick, Preston v. . . . .	291
Schulting, v. Forstman . . . . .	643	Spicer, Johnston v. . . . .	659
Schultz, Biggs v. . . . .	657	Spring v. Haynes . . . . .	528

	PAGE.		PAGE.
Spring, Matter of . . .	652	Taylor v. Millard . . .	363
Stafford, Gignoux v. . .	426	Taylor, Moore v. . .	45, 651
Stahley, Rochester City and Brighton R. R. Co. v. . .	652	Taylor, Welsh v. . .	659
Standard Oil Co., Lubricating Oil Co. v. . . . .	153	Taylor, Yonkers Gas-Light Co. v. . . . .	657
Stanton, Doty v. . . . .	652	Tefft v. Brossell . . .	654
Starin v. Mayor . . . . .	549	Ten Broeck v. Travelers' Ins. Co. . . . .	656
Stearns v. Sherman . . .	659	Terry, People ex rel. Sink- ler v. . . . .	273
Stearns v. St. Louis and San Francisco Ry. Co. . . .	659	Terwilliger, Reid v. . .	310
Steinan, Hoffman v. . . .	659	Terwilliger, Balcom v. . .	170
Stevens, People ex rel. v. Lott, .	408	Terwilliger v. Martin . .	653
Stevens v. Seibold . . . .	651	Thacher, People ex rel. Dorr v. .	349
Stewart, Hatch v. . . . .	164	Thalheimer v. Hays . . .	93, 651
Stillwell v. Zinsser . . . .	656	Thayer v. Dempsey . . .	659
Stimmel, Perkins v. . . .	520	Thayer v. Gile . . . . .	268
Stirling v. Metropolitan Life Ins. Co. . . . .	656	Theall, Cowper v. . . . .	660
Stitt, Redfield v. . . . .	657	Third Nat. Bank v. Elliott .	121
St. Louis and San Francisco Ry. Co., Stearns v. . . .	659	Thompson v. Hazard . . .	655
Stockwell, Post v. . . . .	658	Thorn v. Garner . . . . .	507
Storm v. Storm . . . . .	660	Thorn, People v. . . . .	658
Stott, People v. . . . .	660	Thorne v. Hadden . . . .	654
Suan v. Caffé . . . . .	658	Thornton v. Harris . . . .	655
Sullivan, Adams v. . . . .	278	Tilley v. Goodrich . . . .	656
Supervisors, People ex rel. Carlin v. . . . .	456	Tilton v. Vail . . . . .	638
Surdam v. Cornell . . . .	653	Tisdale v. D. & H. C. Co. .	654
Sweet, Albert v. . . . .	654	Titus, People v. . . . .	658
Sweet, Frear v. . . . .	657	Tonawanda Valley and Cuba R. R. Co. v. N. Y., L. E. and W. R. R. Co. . . . .	496
Sweet, Quinlan v. . . . .	653	Town of Deerpark, Ivory v. .	656
Sweet v. Ross . . . . .	655	Town of Pelham, Malloy v. .	655
Sweeting, Manning v. . . .	655	Tozer, Smith v. . . . .	22
Syracuse Iron Works, Hub- bell v. . . . .	182	Trav. Ins. Co., Ten Broeck v. .	656
<b>T.</b>		Troy and Albia R. R. Co., Hinkley v. . . . .	281
Taber v. Hoffman . . . . .	652	Tuckerman, Meade v. . . .	656
Taintor, Brookway v. . . .	654	Twenty-Third Street Ry. Co., Corbett v. . . . .	587
Tator, Adams v. . . . .	384	<b>U.</b>	
Taylor v. City of Cohoes . .	654	Underhill v. Underhill . . .	656
Taylor, Ely v. . . . .	205	Underwood v. Cook . . . .	651

## TABLE OF CASES REPORTED.

xix

	PAGE.		PAGE.
Union Cemetery Association		Weicken, Haack v. . . . .	486
v. City of Buffalo . . . .	651	Weller v. Pace Tobacco Co. .	659
Universal Life Ins. Co., Peo-		Wells, Matter of . . . . .	656
ple v. . . . .	616, 658	Welsh v. Taylor . . . . .	659
<b>V.</b>		Wendling v. Bainbridge . .	657
Vail v. Reynolds . . . . .	647	Wertheimer, Pratt v. . . . .	657
Vail, Tilton v. . . . .	638	West v. Reynolds . . . . .	653
Van Dermoor, Matter of . .	326	Wetmore, National Trades-	
Van Deusen, Hunt v. . . . .	392	man's Bank, v. . . . .	359
Vandevoort v. Dewey . . . .	68	Wheeler v. Jones . . . . .	374
Van Etten v. Hasbrouck . . .	654	Wheelock, Hamlin v. . . . .	530
Van Etten, Knapp v. . . . .	660	Whitaker v. Press Publish-	
Van Fleet v. Ketcham . . . .	656	ing Co. . . . .	653
Van Horne v. Boston, Hoosac		White v. Boyce . . . . .	656
Tunnel and Western R. R.		White v. Gaines . . . . .	657
Co. . . . .	654	Whiting v. Hood . . . . .	651
Van Horne, Matter of . . . .	653	Wilcox, Eaton v. . . . .	61
Van Orden v. Schleier . . . .	656	Willetts v. Brown . . . . .	140
Van Slyke, Cole v. . . . .	653	Willetts, Matter of . . . . .	658
Vetter, Kreischer v. . . . .	654	Williams, Krotel v. . . . .	658
Vick, Gubner v. . . . .	657	Wilson, Bryan v. . . . .	657
Viele, Bryan v. . . . .	657	Wilson, Munoz v. . . . .	656
Village of Cortland, Fisher v.	173	Wiltsie v. Village of Green-	
Village of Greenbush, Parr v.	232	bush . . . . .	654
Village of Greenbush, Wilt-		Wiswall v. O'Brien . . . . .	654
sie v. . . . .	654	Wolcott, Gray v. . . . .	653
Village of Olean v. King . . .	651	Wolf, Mitnacht v. . . . .	657
Village of Schaghticoke, Pren-		Wolfert, People ex rel. Gil-	
dergast v. . . . .	317	len v. . . . .	656
Voigt v. Brown . . . . .	394	Wood, Kilroy v. . . . .	636
Vrooman v. Clow . . . . .	654	Wood v. Kroll . . . . .	658
<b>W.</b>		Woolsey, Hill v. . . . .	481
Wait, Milk v. . . . .	651	Wright v. Boller . . . . .	77
Wakeman v. Everett . . . . .	659	Wright v. Frankel . . . . .	653
Wall v. Delaware, Lacka-		Wyatt v. Brooks . . . . .	502
wanna and West. R. R. Co.	653	<b>Y.</b>	
Water Commissioners of Am-		Yager v. Person . . . . .	400
sterdam, Matter of, v. Collins	654	Yates v. Heath . . . . .	652
Waterbury, Sanger v. . . . .	657	Yonkers, City of, Pettingill v.	655
Watrous v. Shear . . . . .	653	Yonkers Gas-Light Co. v.	
Weber v. Manne . . . . .	557	Taylor . . . . .	657
Wehrhane v. Nashville C. and		<b>Z.</b>	
St. L. Ry. Co. . . . .	660	Zimmer v. Settle . . . . .	653
		Zinsser, Stillwell v. . . . .	656



# TABLE OF CASES CITED.

\*Distinguished. † Followed. § Not followed. ‡ Doubted. † Limited. ‡ Approved.

## A.

		PAGE.
Abbe v. Eaton . . . . .	51 N. Y. 410 . . . . .	19
Acker v. Acker . . . . .	81 N. Y. 143 . . . . .	629
† ——— v. Leland . . . . .	96 N. Y. 884 . . . . .	508
Ackley v. Dygart . . . . .	88 Barb. 176 . . . . .	506
Ades v. Bigler . . . . .	81 N. Y. 849 . . . . .	383
Adsit v. Butler . . . . .	87 N. Y. 585 . . . . .	363
——— v. Sanford . . . . .	23 Hun, 45 . . . . .	363
Ainsworth v. Backus . . . . .	5 Hun, 415 . . . . .	533
† Allard v. Greasert . . . . .	61 N. Y. 1 . . . . .	575
Allegany Oil Co. v. Bradford Oil Co. . . . .	21 Hun, 26 . . . . .	66
American Ins. Co. v. Oakley . . . . .	9 Paige, 496 . . . . .	589
Andrews v. Townshend . . . . .	14 W. Dig. 243 . . . . .	642
Argotsinger v. Vines . . . . .	82 N. Y. 806 . . . . .	437
Armstrong v. Byrne . . . . .	1 Edw. Ch. 79 . . . . .	49
——— v. Garrow . . . . .	6 Cow. 465 . . . . .	135
——— v. People . . . . .	70 N. Y. 88 . . . . .	518
Arnoux v. Homans . . . . .	32 How. 382 . . . . .	39
Atkin v. Pitcher . . . . .	31 Hun, 352 . . . . .	172
Attorney Genl. v. Continental Life Ins. Co. . . . .	71 N. Y. 325 . . . . .	20
* ——— v. Guardian Mut. Life Ins. Co. . . . .	77 N. Y. 272 . . . . .	201
——— v. Mut. Ins. Co. . . . .	77 N. Y. 275 . . . . .	186
Atwood v. Welton . . . . .	7 Conn. 71 . . . . .	108
Austin v. Munro . . . . .	47 N. Y. 830 . . . . .	328
Ayers v. Lawrence . . . . .	59 N. Y. 192 . . . . .	552

## B.

Babcock v. New York Central and H. R. R. Co. . . . .	20 W. Dig. 477 . . . . .	80
Baker v. City of Utica . . . . .	19 N. Y. 326 . . . . .	182
Bailey v. Ryder . . . . .	10 N. Y. 868 . . . . .	25
† Baine v. City of Rochester . . . . .	85 N. Y. 523 . . . . .	175
Baird v. Mayor . . . . .	96 N. Y. 599 . . . . .	304
Ballou v. Gile . . . . .	50 Wisc. 619 . . . . .	214
Bank of Metropolis v. Jones . . . . .	8 Peters, 12 . . . . .	589
——— Middlebury v. Rutland, etc., R. Co. . . . .	30 Vt. 160 . . . . .	224
——— United States v. Dunn . . . . .	6 Peters, 51 . . . . .	589
——— Whitehall v. Tisdale . . . . .	18 Hun, 151; 84 N. Y. 655 . . . . .	589
Barclay v. Saunders . . . . .	16 How. (U. S.) 535, 542 . . . . .	515
Barker v. Binninger . . . . .	14 N. Y. 280 . . . . .	328
Barlow v. Myers . . . . .	64 N. Y. 41 . . . . .	325

		PAGE.
Barney v. Griffin	2 N. Y. 365	333
Barnum v. Merchants' Fire Ins. Co.	97 N. Y. 186	79
Barrick v. Austin	21 Barb. 241	539
Barron v. Mayor, etc.	7 Peters, 247	106
Bartlett v. Mueller	26 Hun, 235	371
Battle v. Rochester City Bank	5 Barb. 414	114
Bedell v. Barnes	15 Hun, 353	230
Beebe v. Marvin	17 Abb. 194-196	89
Beil v. Packard	69 Ma. 105	396
Belloni v. Freeborn	63 N. Y. 333	191
Belmont v. Erie Railway Co.	53 Barb. 637	92, 96
Benedict v. Field	16 N. Y. 595; 4 Duer, 154,	21, 22
Bennett v. Austin	81 N. Y. 308	129
Bertholf v. O'Reilly	74 N. Y. 525	312
Betts v. Williamsburg	15 Barb. 255	204
Bickerton v. Jaques	26 Hun, 123	358
Billings v. Billings	11 Pick. 461	537
—— v. Russell	101 N. Y. 226	388
Bird v. Mayor	33 Hun, 396	553
Birdsall v. Cary	66 How. 358	204
Bissell v. N. Y. C. and H. R. R. Co.	67 Barb. 385	86
† ——— v. Pearce	28 N. Y. 253	266, 267
—— v. Saxton	66 N. Y. 55	647
Blackburn v. Crawfords	3 Wall. (U. S.) 199	518
* Blashfield v. Blashfield	41 Hun, 249	167
Blossburg and C. R. R. Co. v. Tioga R. R. Co.	1 Keyes, 486	66, 71
Board of Excise v. Garlinghouse	45 N. Y. 249	615
Bocock v. Cochrane	32 Hun, 521	277
Bogart v. Swezy	26 Hun, 463	441
Booth v. Cleveland Mill Co.	74 N. Y. 15-23	4
Bowen v. Mandeville	95 N. Y. 237, 240	304
Bowling Green Savings Bank v. Todd	52 N. Y. 489	548
Bradley v. Amsdon	10 Paige, 235	522
Bradner v. Faulkner	12 N. Y. 472	513
Bragelman v. Dune	69 N. Y. 74	297
Brandon v. Avery	22 N. Y. 469	276
—— v. People	42 N. Y. 269	348
Breen v. People	4 Park Cr. 380	108
Bridenbecker v. Lowell	32 Barb. 9-17	538
Brigg v. Hilton	99 N. Y. 517	393
Briggs v. Allen	4 Hill, 538	167
Brinkerhoff v. Brown	6 Johns. Ch. 139	186
—— v. Merselis	24 N. J. (Law) 680	512
Bristol Bank v. Keavy	126 Mass. 298	530
Broadwell v. Holcombe	4 Civil Pro. R. 159	264
Brotherson v. Consalus	26 Hew. 213	493
Brown v. Brown	53 Barb. 217	514
—— v. ———	1 Barb. ch. 195	333
—— v. Clark	77 N. Y. 369, 375	88
—— v. Commonwealth	78 Pa. 321	108

## TABLE OF CASES CITED.

xxiii

	PAGE.
Brown v. Curtiss . . . . .	2 N. Y. 230 . . . . . 191
— v. Knapp . . . . .	79 N. Y. 136 . . . . . 511, 512
— v. McCune . . . . .	5 Sandf. 224 . . . . . 506
— v. Thurber . . . . .	77 N. Y. 613 . . . . . 613
— v. Vandergrift . . . . .	80 Pa. State, 142 . . . . . 66
— v. Volkening . . . . .	64 N. Y. 76 . . . . . 146
Budd v. Smales . . . . .	N. Y. Daily Reg., March 19, 1884; cited 8 Civ. Pro. R. 230 . . . . . 261
Buerman v. N. Y. Produce Exchange . . . . .	Daily Reg., 1886, p. 785 . . . . . 522
Buffalo Lub. Oil Co. v. Everest . . . . .	80 Hun, 586 . . . . . 156
Burnham v. Bowen . . . . .	111 U. S. 782 . . . . . 418
Burwell v. Jackson . . . . .	9 N. Y. 535 . . . . . 8, 112, 113
Buttrick v. Holden . . . . .	8 Cush. 233 . . . . . 114, 115

## C.

Cameron v. Irwin . . . . .	5 Hill, 272 . . . . . 207
Camp v. Ingersoll . . . . .	86 N. Y. 433 . . . . . 604
Campbell v. Hall . . . . .	16 N. Y. 575 . . . . . 613
— v. Rankin . . . . .	99 U. S. 261 . . . . . 220
Cannon v. N. W. Mut. Life Ins. Co. . . . .	29 Hun, 470 . . . . . 215
Carnoe v. Freetown . . . . .	9 Gray, 357 . . . . . 121
† Cary v. White . . . . .	52 N. Y. 139 . . . . . 374
Case v. Perew . . . . .	34 Hun, 130 . . . . . 80
Central R. R. Co. v. Green . . . . .	86 Penn. St. 421 . . . . . 183
Chadwick v. Clapp . . . . .	69 Ill. 119 . . . . . 145
Chaine v. Wilson . . . . .	1 Bos 673 . . . . . 120
‡ Chance v. Isaacs . . . . .	5 Paige, 592-594 . . . . . 74
Charter v. Stevens . . . . .	3 Den. 83 . . . . . 297
Chase v. Peck . . . . .	21 N. Y. 581 . . . . . 145
Chemical Bank v. Kohner . . . . .	8 Daly 530 . . . . . 533
City of Chicago v. Robbins . . . . .	2 Black. 418; 4 Wall. 657 . . . . . 218
— Oswego v. Oswego Canal Co. . . . .	6 N. Y. 257 . . . . . 220
— Rochester v. Montgomery . . . . .	72 N. Y. 65 . . . . . 218
Clark v. Norton . . . . .	42 N. Y. 243 . . . . . 533
— v. Owens . . . . .	18 N. Y. 434 . . . . . 379
Clarkson v. De Peyster . . . . .	Hopk. 424-427 . . . . . 515
Clute v. Emmerich . . . . .	21 Hun, 122 . . . . . 373
Coakley v. Mahar . . . . .	36 Hun, 157 . . . . . 522
Coates v. Cheever . . . . .	1 Cow. 479 . . . . . 371
Coe v. Cassidy . . . . .	72 N. Y. 137 . . . . . 297
— v. Hobby . . . . .	72 N. Y. 143 . . . . . 211
Collins v. Torry . . . . .	7 Johns. 278 . . . . . 371
* Colomb v. Caldwell . . . . .	16 N. Y. 434 . . . . . 530
Commonwealth v. Cuffee . . . . .	108 Mass. 285 . . . . . 245
— v. Culver . . . . .	126 Mass. 464 . . . . . 345
— v. Cushing . . . . .	99 Mass. 593 . . . . . 121
— v. Piper . . . . .	120 Mass. 185 . . . . . 344
— v. Smith . . . . .	119 Mass. 305 . . . . . 345
Conger v. Vandewater . . . . .	1 Abb. (N. S.) 126 . . . . . 629
† Connors v. People . . . . .	50 N. Y. 240 . . . . . 348

		PAGE.
Conor v. Hilton . . . . .	66 How. 146 . . . . .	277
Continental National Bank v. Townsend	87 N. Y. 8, 10 . . . . .	682
Cook v. Berlin Woolen Mills . . . . .	48 Wisc. 433 . . . . .	129
Cooke v. Platt . . . . .	96 N. Y. 35 . . . . .	433
Cooper v. Jolly . . . . .	30 Hun, 224; 96 N. Y. 667 . . . . .	167
Corbett v. Woodward . . . . .	5 Saw. C. C. Rep. 403 . . . . .	129
Corn Exchange Bank v. Nassau Bank . . . . .	91 N. Y. 74 . . . . .	89
Cox v. People . . . . .	80 N. Y. 500 . . . . .	84, 338
Craig v. Hone . . . . .	2 Edw. Ch. 376, 554 . . . . .	637
Crandall v. Brown . . . . .	18 Hun, 461 . . . . .	206
Crary v. Sprague . . . . .	12 Wend. 41 . . . . .	106
Critteuden v. Fairchild . . . . .	41 N. Y. 289 . . . . .	433, 434
Cromwell v. County of Sac . . . . .	94 U. S. 351 . . . . .	220
—— v. Gallup . . . . .	17 Hun, 61 . . . . .	126
Cronkhite v. Cronkhite . . . . .	94 N. Y. 323 . . . . .	365
* Crook v. Rindskopf . . . . .	34 Hun, 457 . . . . .	530
Crouse v. Frothingham . . . . .	97 N. Y. 105 . . . . .	223, 224, 225
Cuddebach v. Kent . . . . .	5 Paige, 98 . . . . .	523
Cumberland Coal Co. v. Sherman . . . . .	30 Barb. 553 . . . . .	129
Curtis v. Leavitt . . . . .	15 N. Y. 97 . . . . .	383
Cutter v. Poole . . . . .	54 How. 311 . . . . .	642
Cutting v. Cutting . . . . .	96 N. Y. 523 . . . . .	87

## D.

† Dalrymple v. Arnold . . . . .	21 Hun, 110 . . . . .	138
Danolds v. The State . . . . .	89 N. Y. 36, 43 . . . . .	57
Darling v. Rogers . . . . .	22 Wend. 433 . . . . .	383
Davidson v. Alfaro . . . . .	80 N. Y. 660-663 . . . . .	75
Davis v. Brown . . . . .	94 U. S. 423 . . . . .	220
—— v. Spencer . . . . .	24 N. Y. 391 . . . . .	399
—— v. Standish . . . . .	26 Hun, 615 . . . . .	313
Dawley v. Brown . . . . .	79 N. Y. 390 . . . . .	228, 234
Dawson v. People . . . . .	25 N. Y. 399 . . . . .	231*
Dear v. Reed . . . . .	37 Hun, 594 . . . . .	270
Deck v. Works . . . . .	18 Hun, 266-272 . . . . .	190
* De Jonge v. Brenneman . . . . .	28 Hun, 332 . . . . .	585
DeLaVan v. Duncan . . . . .	49 N. Y. 485, 487 . . . . .	8
—— v. Florence . . . . .	9 Abb. 277, note . . . . .	629
Delisle v. Herbs . . . . .	25 Hun, 485 . . . . .	372
Denham v. Jayne . . . . .	8 Hun, 614 . . . . .	151
Dillaye v. Parks . . . . .	31 Barb. 133 . . . . .	180
Diossy v. Morgan . . . . .	74 N. Y. 11 . . . . .	559
Directors N. E. Ry. Co. v. Wanless . . . . .	L. R., 7 Eng. & Irish App. 12, 309 . . . . .	
Dixon v. Rice . . . . .	16 Hun, 422 . . . . .	7
Dodge v. Bradstreet Co. . . . .	59 How. 104 . . . . .	153
Doe v. Phelps . . . . .	9 Johns. 169 . . . . .	378
Dolson v. Saxton . . . . .	11 Hun, 545 . . . . .	126
Doty v. Brown . . . . .	4 N. Y. 71 . . . . .	220
Dowdy v. Commonwealth . . . . .	9 Gratt. 737-784 . . . . .	85
Draper v. Snow . . . . .	20 N. Y. 331 . . . . .	647



## TABLE OF CASES CITED.

XXV

		PAGE.
¶ Dressel v. City of Kingston . . . . .	82 Hun, 526 . . . . .	174, 175
<sup>2</sup> Dresser v. Dresser . . . . .	40 Barb. 300 . . . . .	449, 450
Drury v. Cross . . . . .	7 Wall. 299 . . . . .	129
Duke of Bedford v. Marquess of Abercorn . . . . .	1 Myl. & Cr. 313 . . . . .	518
Dunham v. Whitehead . . . . .	21 N. Y. 131 . . . . .	383
Dupuy v. Wurtz . . . . .	53 N. Y. 556 . . . . .	120, 471
* Durkee v. Nat. Bank of Fort Edward . . . . .	36 Hun, 565 . . . . .	375
Dutcher v. Swartwood . . . . .	15 Hun, 31 . . . . .	293
Dutton v. Kelsey . . . . .	2 Wend. 615 . . . . .	336

## E.

Eagan v. Moore . . . . .	2 Civ. Pro. (Browne) 300 . . . . .	170
Earp v. Georgia . . . . .	55 Ga. 136 . . . . .	345
Eastham v. Riedell . . . . .	125 Mass. 385 . . . . .	90
Eastwood v. Ward . . . . .	85 Law Times (N. S.) 502 . . . . .	224
Eckstein v. Frank . . . . .	1 Daly, 334 . . . . .	506
Eddy v. Davis . . . . .	23 W. Dig. 463 . . . . .	114
Egberts v. Wood . . . . .	3 Paige, 517, 526 . . . . .	529
Elwell v. Chamberlin . . . . .	31 N. Y. 611 . . . . .	177
Ely v. Carnley . . . . .	19 N. Y. 496 . . . . .	295, 298
¶ Emerson v. Senter . . . . .	118 U. S. 3 . . . . .	529
Emmerich v. Hefferan . . . . .	33 Hun, 54 . . . . .	91
Engel v. Fischer . . . . .	15 Abb. N. C. 73 . . . . .	173, 178
Ensign v. McKinney . . . . .	30 Hun, 249 . . . . .	378
Erie Railway Co. v. Ramsey . . . . .	57 Barb. 449 . . . . .	93
* ——— v. Ramsey . . . . .	45 N. Y. 637 . . . . .	535
Estes v. Wilcox . . . . .	67 N. Y. 264 . . . . .	262
Evans v. Hill . . . . .	18 Hun, 464 . . . . .	262
—— v. Thomson . . . . .	5 East. 189 . . . . .	210
Evertson v. Tappen . . . . .	5 Johns. Ch. 511 . . . . .	372
Ex parte Virginia . . . . .	100 U. S. 339 . . . . .	188

## F.

Farmers and Mech. Bank v. B. and D. Bank . . . . .	26 How. 5, 6, 7 . . . . .	536
Fearing v. Irwin . . . . .	55 N. Y. 496 . . . . .	601
¶ Fellows v. Van Hyring . . . . .	32 How. 230 . . . . .	263, 267
Fenner v. Sanborn . . . . .	37 Barb. 610 . . . . .	24, 25
Fiedler v. Day . . . . .	2 Sandf. 594 . . . . .	333
¶ Filley v. Pope . . . . .	115 U. S. 218 . . . . .	580
¶ First Ref. Presb. Church v. Bowden . . . . .	14 Abb. N. C. 356 . . . . .	102
Fish v. Fish . . . . .	39 Barb. 513 . . . . .	226
Fisher v. Hopburn . . . . .	48 N. Y. 41 . . . . .	413
—— v. Met. El. R. R. Co. . . . .	34 Hun, 433 . . . . .	312
—— v. Prowse . . . . .	110 Eng. Com. Law, 770 . . . . .	290
Fister v. La Rue . . . . .	15 Barb. 324 . . . . .	181
Fitch v. American Popular Life Ins. Co. . . . .	59 N. Y. 557 . . . . .	249
Fitzgerald v. People . . . . .	37 N. Y. 413, 426 . . . . .	84, 85
Fiagg v. Mann . . . . .	2 Sumn. 487 . . . . .	145

		PAGE.
Flagg v. People . . . . .	40 Mich. 706 . . . . .	339
Floyd v. Brewster . . . . .	4 Paige, 537 . . . . .	304
Flynn v. R. R. Co. . . . .	49 N. Y. Supr. Ct. (17 J. & S.) 81, 590	
Foot v. Stiles . . . . .	57 N. Y. 399 . . . . .	280, 386
Ford v. Wadsworth . . . . .	19 Wend. 334 . . . . .	378
Fowler v. Mutual Life Ins. Co. . . . .	28 Hun, 198 . . . . .	146
Franklin v. Schermerhorn . . . . .	8 Hun, 112 . . . . .	312
Freeman v. Freeman . . . . .	43 N. Y. 34-39 . . . . .	533
Frost v. Domestic Sewing Machine Co. . . . .	133 Mass. 563 . . . . .	539
G.		
Gage v. Village of Hornellsville . . . . .	41 Hun, 88 . . . . .	175
Gale v. Mead . . . . .	2 Den. 160 . . . . .	231
Gardner v. Ogden . . . . .	23 N. Y. 327 . . . . .	25
¶ Garling v. Ladd . . . . .	27 Hun, 112 . . . . .	171
Garvey v. Owens . . . . .	37 Hun, 498 . . . . .	150
Gay v. Gay . . . . .	10 Paige, 369 . . . . .	75
Geery v. Geery . . . . .	63 N. Y. 252 . . . . .	362
* Genet v. Mitchell . . . . .	7 Johns. 120 . . . . .	315
Geraty v. Reid . . . . .	78 N. Y. 64 . . . . .	276, 277
Gibson v. Williams . . . . .	4 Wend. 320 . . . . .	315
Gilbert v. Knox . . . . .	52 N. Y. 125 . . . . .	566
—— v. Sage . . . . .	5 Lans. 287 . . . . .	180, 181
Gilbert Car Co. v. Mann . . . . .	24 W. Dig. 483 . . . . .	393
Gillis v. Space . . . . .	63 Barb. 178 . . . . .	181
Gilson v. Gilson . . . . .	2 Allen, 115 . . . . .	145
Girvin v. Hickman . . . . .	21 Hun, 316 . . . . .	523
Glushing v. Sharp . . . . .	96 N. Y. 676 . . . . .	308
Good v. Martin . . . . .	95 U. S. 96 . . . . .	177
Graff v. Bonnett . . . . .	31 N. Y. 9 . . . . .	637
Graser v. Stellwagen . . . . .	25 N. Y. 315 . . . . .	42
Green v. Belcher . . . . .	1 Atk. 505 . . . . .	511
—— v. Disbrow . . . . .	56 N. Y. 334 . . . . .	178
—— v. Green . . . . .	9 Cow. 46 . . . . .	114
Grey v. Grey . . . . .	47 N. Y. 552 . . . . .	162
Gribbon v. Freal . . . . .	93 N. Y. 93 . . . . .	170
Gridley v. Gridley . . . . .	24 N. Y. 30 . . . . .	334
Grocers' Bank v. Penfield . . . . .	69 N. Y. 502 . . . . .	631
Grover v. Wakeman . . . . .	11 Wend. 187 . . . . .	42
Guckenheimer v. Angevine . . . . .	37 N. Y. 396 . . . . .	304
Gurney v. Atlantic, etc., R. R. Co. . . . .	58 N. Y. 358 . . . . .	576
H.		
Hale v. Clauson . . . . .	60 N. Y. 341 . . . . .	25
—— v. Omaha Nat. Bank . . . . .	49 N. Y. 626 . . . . .	145
—— v. Sweet . . . . .	40 N. Y. 101 . . . . .	297, 298
Hall v. Edmunds . . . . .	67 How. 202 . . . . .	165
Hannahs v. Hannahs . . . . .	68 N. Y. 610 . . . . .	515
Hardenbergh v. Lakin . . . . .	47 N. Y. 109 . . . . .	373
Hardy v. Yarmouth . . . . .	6 Allen, 277 . . . . .	534

# TABLE OF CASES CITED.

xxvii

	PAGE.
¶ Harris v. Warner . . . . .	13 Wend. 400 . . . . . 191
Hartwell v. Root . . . . .	19 Johns. 345 . . . . . 378
Harvard College v. Gore . . . . .	5 Pick. 879 . . . . . 131
Harvey v. Van Dyke . . . . .	66 How. 396 . . . . . 282, 284, 285
Hastings v. West. Fire Ins. Co. . . . .	78 N. Y. 141 . . . . . 425
Hathaway v. Howell . . . . .	54 N. Y. 97 . . . . . 387
Hauenstein v. Kull . . . . .	59 How. 24 . . . . . 523
Havens v. Sackett . . . . .	15 N. Y. 365-369 . . . . . 490
Haydock v. Coope . . . . .	53 N. Y. 69 . . . . . 296
* Hayes v. Ball . . . . .	72 N. Y. 420 . . . . . 315
Hearle v. Greenbank . . . . .	3 Atk. 695, 716 . . . . . 511
Heath v. Perry . . . . .	3 Atk. 101 . . . . . 511
Hebbard v. Haughian . . . . .	70 N. Y. 54 . . . . . 518
Hegeman v. Fox . . . . .	31 Barb. 475 . . . . . 130
Hellenberg v. Dist. No. 1 . . . . .	94 N. Y. 580 . . . . . 214
Hickey v. Railroad Co. . . . .	14 Allen, 429 . . . . . 135
Higgins v. D. L. and W. R. Co. . . . .	60 N. Y. 553 . . . . . 114
—— v. Moore, . . . . .	34 N. Y. 417 . . . . . 80
—— v. Watervliet Turnpike Co. . . . .	46 N. Y. 23 . . . . . 590
Hitchcock v. Harrington . . . . .	6 Johns. 290 . . . . . 371
Hill v. Burke . . . . .	62 N. Y. 111 . . . . . 88, 89
—— v. Draper . . . . .	10 Barb. 454 . . . . . 378
—— v. Hanford . . . . .	11 Hun, 536 . . . . . 18
—— v. Hotchkin . . . . .	23 Hun, 414 . . . . . 91
—— v. Pine River Bank . . . . .	45 N. H. 300 . . . . . 396
Hitchcock v. Harrington . . . . .	6 Johns. 294 . . . . . 372
Hoffman v. R. R. Co . . . . .	87 N. Y. 25 . . . . . 590
Holcomb v. Holcomb . . . . .	95 N. Y. 316 . . . . . 150
Holsenbake v. Georgia . . . . .	45 Ga. 43 . . . . . 345
Hooker v. Eagle Bank . . . . .	30 N. Y. 85 . . . . . 589
Horton v. Garrison . . . . .	23 Barb. 176 . . . . . 181
—— v. Parsons . . . . .	37 Hun, 42 . . . . . 386
Hotchkiss v. Mosher . . . . .	48 N. Y. 482 . . . . . 18, 19
Howell v. Mills . . . . .	53 N. Y. 322 . . . . . 18
Howland v. Willetts . . . . .	9 N. Y. 174 . . . . . 388
Hoyle v. Railroad Co. . . . .	54 N. Y. 814 . . . . . 129
Hoyt v. Hoyt . . . . .	85 N. Y. 142 . . . . . 433
Hulbert v. N. Y. C. R. R. Co. . . . .	40 N. Y. 145 . . . . . 135
Hull v. Ely . . . . .	2 Abb. (N. O.) 440 . . . . . 552
* Hunt v. Knickerbocker Life Ins. Co. . . . .	101 N. Y. 636 . . . . . 618
Huntington v. Asher . . . . .	96 N. Y. 604 . . . . . 365
—— v. Conkey . . . . .	38 Barb. 218 . . . . . 177
¶ Hurlbert v. Dean . . . . .	2 Abb. Ct. of App. Dec. 429 . . . . . 529
Husted v. Ingraham . . . . .	75 N. Y. 251 . . . . . 114
Hutchins v. Hutchins . . . . .	7 Hill, 107 . . . . . 156
Hutton v. Benkard . . . . .	92 N. Y. 296 . . . . . 37, 38
¶ Hyde v. Tanner . . . . .	1 Barb. 75 . . . . . 598
Hyland v. Baxter . . . . .	31 Hun, 354; 98 N. Y. 610 . . . . . 14
Hyalop v. Clarke . . . . .	14 Johns. 458 . . . . . 42

## I.

		PAGE.
¶ Isham v. Fullager . . . .	14 Abb. N. O. 368 . . . .	102
¶ ——— v. Trustees, etc. . . .	63 How. 495 . . . .	103

## J.

Jackson v. Graham . . . .	8 Caines, 188 . . . .	380
——— v. Hasbrouck . . . .	12 Johns. 213 . . . .	378
——— v. Osborn . . . .	2 Wend. 555 . . . .	273
——— v. Roberts . . . .	11 Wend. 425 . . . .	378
——— v. Sternbergh . . . .	1 Johns. Cases, 153 . . . .	380
James v. Burchell . . . .	82 N. Y. 108 . . . .	114, 115
Jessurun v. Mackie . . . .	24 Hun, 624; S. C., 86 N. Y. 623 . . . .	264
Jones v. Gardner . . . .	10 Johns. 206 . . . .	7, 8
——— v. Southall . . . .	32 Beav. 81 . . . .	36
* Joslyn v. Joslyn . . . .	9 Hun, 888 . . . .	450
Judd v. Gibbs . . . .	8 Gray, 539 . . . .	224
¶ Judson v. Village of Olean . . . .	40 Hun, 158 . . . .	175
——— v. Wass . . . .	11 Johns. 525 . . . .	114
Justice v. Lang . . . .	42 N. Y. 524 . . . .	5

## K.

Kellogg v. N. Y. C. and H. R. R. Co. . . . .	79 N. Y. 72 . . . .	308
Ker v. Wauchope . . . .	1 Bligh, 21, 22 . . . .	489
Kerr v. Blodgett . . . .	48 N. Y. 62, 67 . . . .	543
Ketchum v. Evertson . . . .	13 Johns. 359 . . . .	114
Kibbe v. Wetmore . . . .	81 Hun, 424 . . . .	169
Kilburn v. Lowe . . . .	37 Hun, 237 . . . .	167
King v. Talbot . . . .	40 N. Y. 76 . . . .	511
Kinney v. Kiernan . . . .	49 N. Y. 168, 172 . . . .	302, 304, 306
Kinnier v. Rogers . . . .	42 N. Y. 537 . . . .	484
¶ Kirby v. Schoonmaker . . . .	3 Barb. Ch. 46 . . . .	529
——— v. Schoonmaker . . . .	3 Barb. Ch. 46, 48 . . . .	224, 382
Knapp v. McGowan . . . .	96 N. Y. 86 . . . .	297
Knox v. McDonald . . . .	25 Hun, 268 . . . .	264
Kober v. Miller . . . .	38 Hun, 184 . . . .	348
Koehler v. Iron Company . . . .	2 Black, 715 . . . .	129

## L.

Ladd v. Moore . . . .	3 Sands, 589 . . . .	301
¶ Laird v. Arnold . . . .	25 Hun, 4 . . . .	188
Latham v. Richards . . . .	12 Hun, 380 . . . .	556
Lattimore v. Harsen . . . .	14 Johns. 330 . . . .	210
Lawrence v. Taylor . . . .	5 Hill, 107 . . . .	114
Leftwich v. Commonwealth . . . .	20 Gratt. 716 . . . .	85
Leitch v. Hollister . . . .	4 N. Y. 211, 216 . . . .	297, 383
Leland v. Cameron . . . .	81 N. Y. 115 . . . .	379
Le Marchant v. Le Marchant . . . .	45 Law Jour. (P. & D.) 48 . . . .	527
* Lewis v. Lewis . . . .	11 N. Y. 220 . . . .	435
——— v. Merritt . . . .	98 N. Y. 207, 208 . . . .	161
Lindsay v. Jackson . . . .	2 Paige, 581 . . . .	75
* Lindsley v. European Petroleum Co. . . .	3 Lans. 176 . . . .	177

# TABLE OF CASES CITED.

xxix

		PAGE.
Little v. Banks . . . . .	85 N. Y. 263 . . . . .	285
¶ Littlefield v. Albany County Bank . . . . .	97 N. Y. 581 . . . . .	76
Livingston's Case . . . . .	84 N. Y. 555 . . . . .	606
—— v. Mayor . . . . .	8 Wend. 85 . . . . .	304
Lobdell v. Stowell . . . . .	51 N. Y. 70 . . . . .	269, 270
Loder v. Hatfield . . . . .	71 N. Y. 92 . . . . .	881
Long v. Strauss . . . . .	{ 6 N. E. Rep. 128; 7 id. 768; 84 Alb. L. J. 71, 152 . . . . .	19
Long Island R. R. Co. v. Bennett . . . . .	10 Hun, 91 . . . . .	204
Lorillard v. Clyde . . . . .	86 N. Y. 385 . . . . .	180, 182
Lummis v. Kasson . . . . .	43 Barb. 378 . . . . .	126
<b>M.</b>		
Mabbett v. White . . . . .	13 N. Y. 442 . . . . .	42
Maderia v. Maderia . . . . .	5 Eastern Rep. 494 . . . . .	215
Magne v. Seymour . . . . .	5 Wend. 309 . . . . .	126
Mandeville v. Reynolds . . . . .	68 N. Y. 528 . . . . .	879
Marston v. Paulding . . . . .	10 Paige, 40 . . . . .	338
Martin v. Farnham . . . . .	5 Foster (25 N. H.) 199 . . . . .	106
—— v. Funk . . . . .	75 N. Y. 142 . . . . .	425
* —— v. Kunzmüller . . . . .	87 N. Y. 396 . . . . .	74
¶ Massey v. Mutual Relief Society . . . . .	{ 102 N. Y. 523; affirming 84 Hun, 254, . . . . .	256, 258
Masterton v. Mayor . . . . .	7 Hill, 61 . . . . .	57
Matchin v. Matchin . . . . .	6 Penn. 382 . . . . .	527
Matter of Beckett . . . . .	85 Hun, 447 . . . . .	566
—— Bostwick . . . . .	4 Johns. Ch. 100 . . . . .	18
—— George . . . . .	22 (Moak's) Eng. Rep. 507-510, 512 . . . . .	512
—— Higgins . . . . .	94 N. Y. 554 . . . . .	485
—— Hunter . . . . .	1 Edw. Ch. 1, 6 . . . . .	8
—— Kendall . . . . .	85 N. Y. 302 . . . . .	887
—— Knapp . . . . .	85 N. Y. 284 . . . . .	548
—— Lamberson . . . . .	63 Barb. 297 . . . . .	189
—— Mace . . . . .	4 Redf. 325 . . . . .	140
¶ —— Phillips . . . . .	98 N. Y. 267 . . . . .	435
—— Rouse's Estate . . . . .	9 Hare 649, 658 . . . . .	512
—— Wakker . . . . .	8 Barb. 162 . . . . .	275
—— Waldron . . . . .	13 Johns. 418 . . . . .	609
—— Watson . . . . .	10 Abb. N. C. 215 . . . . .	609
—— Welch . . . . .	74 N. Y. 299 . . . . .	610, 611
—— Will of Cottrell . . . . .	95 N. Y. 385 . . . . .	565
—— Wrigley . . . . .	8 Wend. 141 . . . . .	120
Maynard v. Beardsley . . . . .	7 Wend. 561 . . . . .	315
Mayor, etc., v. Stirling . . . . .	29 Md. 48 . . . . .	584
Mayor, etc., v. Troy and L. R. R. Co. . . . .	49 N. Y. 657 . . . . .	218
¶ McCabe v. McCabe . . . . .	18 Hun, 153, . . . . .	450
McCollum v. Seward . . . . .	62 N. Y. 316 . . . . .	487
McCormick v. Penn. Cent. R. R. Co. . . . .	49 N. Y. 308 . . . . .	439
McCrea v. Purmort . . . . .	16 Wend. 480 . . . . .	5
McHenry v. Hazard . . . . .	45 N. Y. 581 . . . . .	186

	PAGE.
McKay v. Draper . . . . .	37 N. Y. 360 . . . . . 214
McKnight v. Devlin . . . . .	52 N. Y. 399 . . . . . 220
McMaster v. President, etc. . . . .	55 N. Y. 223 . . . . . 613
McMurray v. Noyes . . . . .	73 N. Y. 523-525 . . . . . 191
McNeil v. Tenth National Bank . . . . .	46 N. Y. 325 . . . . . 505
Mead v. Roxborough . . . . .	11 Cush. 362 . . . . . 121
Mead v. Stratton . . . . .	87 N. Y. 493 . . . . . 310, 311
¶ Mee v. McNider . . . . .	39 Hun, 345 . . . . . 575
Meech v. Allen . . . . .	17 N. Y. 300 . . . . . 224
Merchants' Bank v. State Bank . . . . .	10 Wall. 604, 650 . . . . . 538
¶ Merrill v. Agricultural Ins. Co. . . . .	73 N. Y. 452 . . . . . 578
Merrill v. Green . . . . .	55 N. Y. 270 . . . . . 4
Metropolitan Trust Co. v. Tonawanda Valley, etc., R. R., Co. . . . .	108 N. Y. 245 . . . . . 417
Meyer v. Peck . . . . .	28 N. Y. 590 . . . . . 19
Mill Dam Foundry v. Hovey . . . . .	21 Pick. 417 . . . . . 234
¶ Miller v. Hall . . . . .	8 J. & S. 262; affirmed, 70 N. Y. 250 . . . . . 201
Miller v. Miller, . . . . .	32 Hun, 481 . . . . . 165
* Millerd v. Thorn . . . . .	56 N. Y. 404 . . . . . 177
Milligan v. Robinson . . . . .	16 N. Y. W. Dig. 96 . . . . . 151
Milliken v. Pratt . . . . .	125 Mass. 374 . . . . . 396
Mitchell v. Bunch . . . . .	2 Paige, 606-615 . . . . . 25
—— v. Mitchell . . . . .	16 Hun, 97; 77 N. Y. 596 . . . . . 566
Moakley v. Riggs . . . . .	19 Johns. 69 . . . . . 191
Morris v. Rexford . . . . .	18 N. Y. 557 . . . . . 304
Morrison v. Atwell . . . . .	9 Bos. 508 . . . . . 223
—— v. Sayre . . . . .	40 Hun, 465 . . . . . 275
Morton v. Metropolitan Life Ins. Co. . . . .	34 Hun, 367 . . . . . 158
Mott v. Ackerman . . . . .	92 N. Y. 539 . . . . . 482
—— v. Consumers' Ice Co. . . . .	73 N. Y. 548 . . . . . 157
Mowry v. Peet . . . . .	88 N. Y. 456 . . . . . 448
Muir v. Trustees, etc. . . . .	8 Barb. Ch. 477 . . . . . 332
Muller v. Eno . . . . .	14 N. Y. 597 . . . . . 398
Mumford v. Exchange Bank . . . . .	5 Denio, 855, 859 . . . . . 539
Munn v. Illinois . . . . .	94 U. S. 113, 149 . . . . . 187, 188
Munroe v. Armstrong . . . . .	96 Pa. State, 307 . . . . . 66
Murray v. Blachford . . . . .	1 Wend. 588, 617 . . . . . 585
* Myers v. Davis . . . . .	22 N. Y. 489 . . . . . 74

## N.

Neaffle v. Hart . . . . .	4 Lana. 4 . . . . . 576
Nelson v. Tenney . . . . .	36 Hun, 327 . . . . . 529
Neu v. McKechnie . . . . .	95 N. Y. 632, 636 . . . . . 312, 404
Newcomb v. Brackett . . . . .	16 Mass. 161 . . . . . 114
Newton v. Bronson . . . . .	18 N. Y. 587 . . . . . 25
New York Mutual Life Ins. Co. v. Armstrong . . . . .	117 U. S. 591 . . . . . 391
Nicoll v. Burke . . . . .	78 N. Y. 585 . . . . . 210
Nourse v. Flak . . . . .	1 Ves. 342 . . . . . 518

## TABLE OF CASES CITED.

xxxi

## O.

PAGE.

Ogdensburg and L. C. R. Co. v. V. and C. R. Co.	68 N. Y. 176	88
Olmsted v. Keyes	85 N. Y. 593, 600	256, 258
O'Neil v. Salmon	25 How. Pr. 246	224
— v. Salmon	25 How. 246	580
Orser v. Orser	24 N. Y. 2	566
Osborn v. Schenck	88 N. Y. 201	270
Overheiser v. Morehouse	2 How. (N. S.) 257; S. C., 16 Abb. N. C. 206; 8 N. Y. Civ. Pro. Rep. 11	165
Overing v. Foote	65 N. Y. 263	583
Overseers v. Overseers	10 Johns. 229	613

## P.

Paige v. Willet	88 N. Y. 28	126
Palmer v. Fort Plain and C. P. R. Co.	11 N. Y. 376	4
Pardee v. Fish	60 N. Y. 265; 67 Barb. 407	19
Parr v. Greenbush	72 N. Y. 463	233
Patrick v. Excelsior Life Ins. Co.	67 Barb. 203	249
Patterson v. Patterson	59 N. Y. 574	138
Payne v. Gardiner	29 N. Y. 146; 89 Barb. 634	19
— v. Wilson	11 Hun, 305; S. C. 74 N. Y. 355	467, 468
Pearse v. Pettis	47 Barb. 276	801, 804, 805
Pease v. Barnett	30 Hun, 525	150
Pease v. Copp	67 Barb. 132	576
Peck v. Callaghan	95 N. Y. 78	272
Peck v. Tiffany	2 N. Y. 456	388
Peckham v. Haddock	36 Ill. 88	145
People v. Barker	2. N. W. Rep. 589	345
— v. Bragle	88 N. Y. 585	178
— v. Casey	72 N. Y. 394	401
— v. Commissioners of Taxes	95 N. Y. 359	173
— v. Conroy	97 N. Y. 62	84
— v. Cook	8 N. Y. 67	275
¶ — v. Crapo	76 N. Y. 288	346
* — v. Croswell	3 Johns. Cases, 340	315
— v. Cunningham	1 Denio, 536	108
— v. Enoch	13 Wend. 159	84
— v. Gates	13 Wend. 311	358
— v. Hovey	30 Hun, 354	368
¶ — v. Irving	95 N. Y. 541	348
— v. Irving	95 N. Y. 544	400
— v. Jersey	18 Cal. 337	86
— v. Keyser	28 N. Y. 236	585
— v. McDonald	26 Hun, 156	199
— v. McGloin	28 Hun, 150; 91 N. Y. 241	338
— v. Miller	2 Park. Cr. Rep. 197	358
— v. Miller	12 Cal. 291	86
¶ — v. Moett	23 Hun, 60-65	356

			PAGE.
People v. Moore . . . . .	87 Hun, 84 . . . . .		85
— v. Newman . . . . .	5 Hill, 295 . . . . .		106
— v. Poggi . . . . .	19 Cal. 600 . . . . .		86
— v. Steele . . . . .	2 Barb. 397 . . . . .		103
— v. Wentz . . . . .	37 N. Y. 308 . . . . .		338
— v. Whipple . . . . .	9 Cow. 707 . . . . .		341
— v. White . . . . .	24 Wend. 520 . . . . .		275
— v. Willett . . . . .	4 Eastern Rep. 397; 102 N. Y. 258, . . . . .		85
— v. Williams . . . . .	35 Hun, 516 . . . . .		106
— v. Wolcott . . . . .	51 Mich. 613 . . . . .		341
— ex rel. Academy of the Sacred Heart, etc., v. Commissioners . . . . .	6 Hun, 109; 64 N. Y. 656. . . . .		81
— ex rel. Ainslee v. Howlett . . . . .	13 Hun, 188 . . . . .		259
— ex rel. Ainslee v. Howlett . . . . .	76 N. Y. 574, 576, . . . . .	259, 261, 264	
— ex rel. Boltzer v. Daley . . . . .	37 Hun, 461 . . . . .		331
— ex rel. Brush v. Brown . . . . .	35 Hun, 324 . . . . .		609
— ex rel. Bush v. Thornton . . . . .	25 Hun, 456 . . . . .		275
— ex rel. Chamberlain v. Forrest . . . . .	96 N. Y. 544 . . . . .		588
— ex rel. Comstock v. Lucas . . . . .	93 N. Y. 535 . . . . .	386, 387	
— ex rel. Corwin v. Walter . . . . .	68 N. Y. 411 . . . . .		241
— ex rel. Flanagan v. Police Comrs. . . . .	93 N. Y. 97 . . . . .		440
— ex rel. Hart v. Fire Comrs. . . . .	82 N. Y. 358 . . . . .		440
— ex rel. Hopson v. Hopson . . . . .	1 Denio, 574 . . . . .		387
— ex rel. Jackson v. Potter . . . . .	47 N. Y. 375 . . . . .		624
— ex rel. Jennys v. Brennan . . . . .	6 T. & C. 120-126 . . . . .		89
— ex rel. King v. Gallagher . . . . .	11 Abb. N. C. 187 . . . . .		187
— ex rel. King v. Gallagher . . . . .	93 N. Y. 488 . . . . .		188
— ex rel. Law v. Commissioners . . . . .	9 Hun, 609 . . . . .		243
— ex rel. Marsh v. Delaney . . . . .	49 N. Y. 655 . . . . .		243
— ex rel. McCarthy v. Police Comrs. . . . .	98 N. Y. 333 . . . . .		440
— ex rel. Oswald v. Goff . . . . .	52 N. Y. 484 . . . . .		33
— ex rel. Smith v. Schiellein . . . . .	95 N. Y. 124 . . . . .		276
— ex rel. St. John's College v. Commissioners . . . . .	10 Hun, 246 . . . . .	81, 82	
— ex rel. Weeks v. Supervisors . . . . .	82 N. Y. 275 . . . . .		241
— ex rel. Williamson v. McKinney, . . . . .	52 N. Y. 374 . . . . .		386
— ex rel. Woods v. Crissey . . . . .	91 N. Y. 635 . . . . .		386
Perry v. Dickerson . . . . .	85 N. Y. 345 . . . . .		235
Peterson v. Mayor . . . . .	17 N. Y. 449 . . . . .		539
Petty v. Tooker . . . . .	31 N. Y. 267 . . . . .		100
Phelps v. Phelps . . . . .	72 N. Y. 350 . . . . .		85
Pickens v. Rymer . . . . .	90 N. C. 282 . . . . .		284
Pierce v. Gibson . . . . .	9 Vt. 223 . . . . .		108
Pierce v. Keator . . . . .	70 N. Y. 419 . . . . .		365
Pool v. Watson . . . . .	50 Supr. Ct. 53 . . . . .		632
¶ Pope v. Allis . . . . .	15 U. S. 363 . . . . .	576, 577	
¶ — v. Porter . . . . .	102 N. Y. 366 . . . . .		577
Porter v. State . . . . .	55 Ala. 95 . . . . .		340
President, etc., Bank of Poughkeepsie v. Hasbrouck . . . . .	6 N. Y. 216, 231 . . . . .		514
Prindle v. Caruthers . . . . .	15 N. Y. 425 . . . . .		186



## TABLE OF CASES CITED.

xxxiii

		PAGE.
Prouty v. Price . . . . .	50 Barb. 344 . . . . .	400
Purvis v. Rayer . . . . .	9 Price, 488 . . . . .	118

## R.

Railroad Co. v. Brown . . . . .	17 Wall. 446 . . . . .	188
——— v. Roach . . . . .	80 N. Y. 389 . . . . .	173
Ramsden v. Railway Co. . . . .	104 Mass. 117 . . . . .	590
Ramsey v. Erie Ry. Co. . . . .	57 Barb. 450 . . . . .	96
Rawlins v. Vidvard . . . . .	34 Hun. 205 . . . . .	811, 312
Real v. People . . . . .	42 N. Y. 371 . . . . .	401
Reed v. Home Savings Bank . . . . .	180 Mass. 445 . . . . .	157
—— v. McCourt . . . . .	41 N. Y. 435 . . . . .	378
—— v. Randall . . . . .	29 N. Y. 358 . . . . .	576
Remsen v. Brinckerhoff . . . . .	26 Wend. 325, 332 . . . . .	566
† ——— v. People . . . . .	43 N. Y. 6 . . . . .	356
Resseguie v. Mason . . . . .	58 Barb. 89 . . . . .	151
Rex v. Baldry . . . . .	2 Den. (C. C. 431 . . . . .	343
—— v. Rudd . . . . .	Cowp. 331 . . . . .	343
—— v. Rudd . . . . .	1 Leach, 115, . . . . .	341
—— v. Warringham . . . . .	{ Note to Rex v. Baldry, 2 Den. C. C. 431 . . . . .	341
Rice v. Davis . . . . .	7 Lana. 393 . . . . .	378
Riker v. Darke . . . . .	4 Edw. Ch. 668 . . . . .	639
Risley v. Phenix Bank . . . . .	83 N. Y. 318 . . . . .	31
Roach v. Cosine . . . . .	9 Wend. 328 . . . . .	261
Robertson v. Bullions . . . . .	11 N. Y. 243 . . . . .	100
Roe v. Boyle . . . . .	81 N. Y. 305 . . . . .	164, 448
Root v. Wagner . . . . .	30 N. Y. 9 . . . . .	338
* Roseboom v. Roseboom . . . . .	15 Hun. 309 . . . . .	450
Rounds v. Mansfield . . . . .	38 Me. 586 . . . . .	231
Rown v. Christopher, etc., R. R. Co. . . . .	34 Hun. 471 . . . . .	590
Runyan v. Stewart . . . . .	12 Barb. 537 . . . . .	371
Russell v. Austin . . . . .	1 Paige, 192 . . . . .	373
—— v. Doty . . . . .	4 Cow. 576 . . . . .	330
—— v. Jackson . . . . .	15 Jur. 1117 . . . . .	518
—— v. Place . . . . .	94 U. S. 606 . . . . .	230
Ryan v. People . . . . .	79 N. Y. 594 . . . . .	343

## S.

Sands v. Hughes . . . . .	53 N. Y. 298 . . . . .	227
Sandy River Bank v. Merchants' Bank . . . . .	1 Biss. 146 . . . . .	540
Schunemann v. Paradise . . . . .	46 How. 426 . . . . .	506
† Scott v. Guernsey . . . . .	48 N. Y. 106 . . . . .	598
Scott v. Provident Mut. Relief Assn. . . . .	5 Eastern Rep. 749 . . . . .	215
—— v. Stebbins . . . . .	91 N. Y. 605 . . . . .	433, 434
Scudder v. Union Nat. Bank . . . . .	91 U. S. 406 . . . . .	396
Sears v. Hyer . . . . .	1 Paige, 483, 486 . . . . .	639, 640
Secor v. Sturges . . . . .	16 N. Y. 548 . . . . .	578
Segelken v. Meyer . . . . .	94 N. Y. 47 . . . . .	532
Senear v. Woods . . . . .	74 N. Y. 615 . . . . .	54

	PAGE.
Bewell v. Cohoes . . . . .	75 N. Y. 45 . . . . . 218, 219
Seymour v. Fellows . . . . .	77 N. Y. 178 . . . . . 437
Shanks v. Klein . . . . .	104 U. S. 18 . . . . . 539
Shattuck v. Cassidy . . . . .	8 Edw. Ch. 153 . . . . . 25
Sheehan v. Buller . . . . .	24 W. Dig. 168 . . . . . 173
Shields v. Sullivan . . . . .	8 Dem. 296 . . . . . 485
Sheldon v. Payne . . . . .	7 N. Y. 453 . . . . . 125
Sickels v. Pattison . . . . .	14 Wend. 257 . . . . . 56
Sill v. Village of Corning . . . . .	15 N. Y. 297 . . . . . 276
Sillick v. Mason . . . . .	2 Barb. Ch. 79 . . . . . 687, 688
Silver v. Cummings . . . . .	7 Wend. 183 . . . . . 181
* Simmons v. Havens . . . . .	101 N. Y. 427, 428 . . . . . 151
Simson v. Hart . . . . .	14 Johns. 63 . . . . . 92
Smiley v. Fry . . . . .	100 N. Y. 262 . . . . . 19
Smith v. Beattie . . . . .	31 N. Y. 542 . . . . . 297
—— v. Felton . . . . .	48 N. Y. 419 . . . . . 75
—— v. Fox . . . . .	48 N. Y. 674 . . . . . 75
—— v. Howard . . . . .	20 How. Pr. 121 . . . . . 224
* —— v. Long . . . . .	12 Abb. N. C. 113 . . . . . 428, 430
—— v. Schenck . . . . .	18 Barb. 344 . . . . . 399
—— v. Spalding . . . . .	3 Rob. 615 . . . . . 92, 98, 96
Snook v. Fries . . . . .	19 Barb. 313 . . . . . 56
Snyder v. White . . . . .	6 How. Pr. 321 . . . . . 93
Souter v. Drake . . . . .	5 B. & Adel. 992 . . . . . 113
South Baptist Soc. v. Clapp . . . . .	18 Barb. 36 . . . . . 234
Southgate v. Atlantic and Pac. R. R. Co. . . . .	61 Mo. 89-94 . . . . . 539
Spaulding v. Strang . . . . .	37 N. Y. 139 . . . . . 42
* Spencer v. Field . . . . .	10 Wend. 88 . . . . . 470
Sprague v. Blake . . . . .	30 Wend. 61 . . . . . 576
Stackus v. N. Y. C. and H. R. R. R. Co. . . . .	79 N. Y. 464, 468 . . . . . 306, 453
* Stafford v. Pooler . . . . .	67 Barb. 143 . . . . . 576
Stallings v. Georgia . . . . .	47 Ga. 573 . . . . . 345
Starbird v. Barrows . . . . .	48 N. Y. 204 . . . . . 178
Starks v. People . . . . .	5 Denio, 108 . . . . . 108
State v. Garvey . . . . .	28 La. Ann. 925 . . . . . 341
—— v. Johnson . . . . .	30 La. Ann. (Part II) 811 . . . . . 341, 343
—— v. Matthews . . . . .	10 Ohio St. 436 . . . . . 584
—— v. Society, etc., . . . . .	15 Vroom. 502 . . . . . 220
—— v. Vann . . . . .	32 N. C. 631 . . . . . 345
St. John v. Am. M. Ins. Co. . . . .	18 N. Y. 31 . . . . . 215
—— v. Diefendorf . . . . .	12 Wend. 261 . . . . . 547
Steele v. Benham . . . . .	34 N. Y. 634 . . . . . 298
Steers v. City of Brooklyn . . . . .	101 N. Y. 51 . . . . . 600
Sternberger v. McGovern . . . . .	56 N. Y. 12 . . . . . 7
Steuben Co. Bank v. Alberger . . . . .	75 N. Y. 179 ; 83 N. Y. 274 . . . . . 96
Stevens v. Austin . . . . .	1 Metc. 558 . . . . . 302
—— v. Hunt . . . . .	15 Barb. 17 . . . . . 7
Stewart v. Brooklyn and C. R. R. Co. . . . .	90 N. Y. 588 . . . . . 590
—— v. Chrysler . . . . .	100 N. Y. 878 . . . . . 533
Stinson v. Boston . . . . .	125 Mass. 343 . . . . . 584

# TABLE OF CASES CITED.

xxxv

		PAGE.
Stoddard v. Onondaga Conference	12 Barb. 575	158
† Story v. N. Y. Elevated R. R. Co.	90 N. Y. 122	509
Story v. Williamsburgh M. M. B. Asso.	95 N. Y. 474	214
† Stover v. People	56 N. Y. 315	356
Stowell v. Chamberlain	60 N. Y. 276	234
Strauder v. West Virginia	100 U. S. 308	188
Stroher v. Elting	97 N. Y. 102	458
Struthers v. Pearce	51 N. Y. 865	231
Stuyvesant v. Hall	2 Barb. Ch. 151	585
† Sunderlin v. Wyman	10 Hun, 498	366, 267
Supervisors of Saratoga Co. v. Deyoe	77 N. Y. 219	186
<u>                    </u> v. Seabury,	11 Abb. N. C. 461	186
	2 How. (N. S.) 56; S. C. 15 Abb.	
Sutton v. Newton	N. C. 452; 7 N. Y. Civ. Pro.	
	Rep. 384	165
Swaine v. Perine	5 Johns. Ch. 491	373
Sweeney v. Railroad Co.	10 Allen, 368	135
† Swift v. Opdyke	43 Barb. 274	578

## T.

Tallman v. Franklin	14 N. Y. 584	4, 5
Taylor v. Guest	58 N. Y. 266	177
Tenney v. East Warren Co.	43 N. H. 343	234
Terrett v. Cowenhoven	11 Hun, 320	259
* The Cayuga	14 Wall. 270	476, 477
* The Clement	1 Sprague, 257	476, 480
The Franconia	2 Prob. Div. 13	477
* The Peckforton Castle	2 Prob. Div. 222	476, 477
The Peckforton Castle	3 Asp. Mer. Cas. (N. S.) 511	480
The Ranger	L. R., 4 P. C. 519	478
The Velocity	L. R., 8 P. O. 44	477
Thelasson v. Woodford	18 Vesey, 224	489
Thirty-fourth Street Case	102 N. Y. 343	624
Thomas v. Bennett	56 Barb. 197	522
Thomson v. McGregor	81 N. Y. 593	647
Thurber v. Harlem, etc., R. R. Co.	60 N. Y. 331	453
Tibbitts v. Tibbitts	19 Vesey, 668	489, 490
Tinsdale v. Murray	9 Daly, 449	683
Tipton v. Feitner	20 N. Y. 423	56
Tolles v. Wood	99 N. Y. 616	637
* Townsend v. Corning	23 Wend. 435	470
Townsend Mfg. Co. v. Foster	51 Barb. 346; 41 N. Y. 620	178
Trustees of East Hampton v. Kirk	68 N. Y. 459; S. C. 84 id. 216	406
Tucker v. Tucker	11 Jurist (Eng.), 893	527
Turk v. Ridge	41 N. Y. 201	4
Tutchin's Case	14 State Trials, 1095	316

## U

United States v. Cruikshank	92 U. S. 542	106
Utica Ins Co. v. Lynch	11 Paige, 520	515

## V.

		PAGE.
Vandevoort v. Dewey . . . .	42 Hun, 68 . . . .	66
Van Dyne v. Thayer . . . .	19 Wend. 162 . . . .	372
Van Hagen v. Van Renesse, aer . . . .	18 Johns. 420 . . . .	210
Van Rossum v. Walker . . . .	11 Barb. 237 . . . .	224
Van Vechten v. Hopkins . . . .	5 Johns. 211 . . . .	215
Village of Deposit v. Vail . . . .	5 Hun, 310 . . . .	276, 277
Village of Port Jervis v. First Nat. Bank, . . . .	96 N. Y. 556 . . . .	218
Volans v. Owen . . . .	74 N. Y. 526 . . . .	310
Vosburgh v. Huntington . . . .	15 Abb. 254 . . . .	214
* Vrooman v. Turner . . . .	69 N. Y. 280 . . . .	325

## W.

Wait v. Agricultural Ins. Co. . . .	18 Hun, 371 . . . .	453
—— v. Ray . . . .	67 N. Y. 38 . . . .	181
Walker v. Wetherell . . . .	6 Vesey, 473 . . . .	18
Wallace v. First Parish in Townsend . . . .	109 Mass. 263 . . . .	588
—— v. Morss . . . .	5 Hill, 391 . . . .	506
Walter v. Hodge . . . .	2 Swanst. 97 . . . .	163
Walther v. Sauvinet . . . .	92 U. S. 90 . . . .	106
Wanless v. N. E. Ry. Co. . . .	6 Q. B., 481 . . . .	309
Warner v. Beers . . . .	28 Wend. 156 . . . .	352
—— v. Paine . . . .	3 Barb. Ch. 620 . . . .	493
Warrin v. Baldwin . . . .	35 Hun, 334 . . . .	552
Waters v. Langdon . . . .	40 Barb. 408 . . . .	276
Watson v. Bennett . . . .	12 Barb. 196 . . . .	540
Weaver v. Bardon . . . .	49 N. Y. 286 . . . .	505
Weaver v. Ely . . . .	88 N. Y. 89 . . . .	280
Weed v. Bibbins . . . .	33 Barb. 315 . . . .	315
Weeks v. Cornwall . . . .	39 Hun, 643 . . . .	186
—— v. Ellis . . . .	2 Barb. 320 . . . .	387
—— v. Tomes . . . .	16 Hun, 349; 76 N. Y. 601 . . . .	170
Wehle v. Connor . . . .	69 N. Y. 546 . . . .	126
Weller v. Hersee . . . .	10 Hun, 431 . . . .	647
* Wells v. Miller . . . .	66 N. Y. 255 . . . .	191
Wenzler v. People . . . .	58 N. Y. 516 . . . .	276, 277
Wesleyan Academy v. Wilbraham . . . .	99 Mass. 599 . . . .	32
West v. Kiersted . . . .	15 W. Dig. 549 . . . .	80
Western Bank v. Gilstrap . . . .	45 Mo. 419 . . . .	539
Westfall v. Preston . . . .	49 N. Y. 349 . . . .	533
Westover v. Ætna Ins. Co. . . .	99 N. Y. 56 . . . .	518
West St. L. Savings Bank v. Shawnee Co. Bank . . . .	95 U. S. 557 . . . .	539
Wetmore v. Hegeman . . . .	88 N. Y. 73 . . . .	493
—— v. Law . . . .	34 Barb. 515-517 . . . .	25
Wever v. Marvin . . . .	14 Barb. 376 . . . .	323
Wheeler v. Allen . . . .	59 How. 118 . . . .	633
—— v. Newbould . . . .	16 N. Y. 392 . . . .	80
White v. Drew . . . .	56 How. 53 . . . .	533
—— v. Hicks . . . .	33 N. Y. 383; 43 Barb. 64 . . . .	89

# TABLE OF CASES CITED.

xxxvii

		PAGE.
—— v. Munroe . . . . .	88 Barb. 654 . . . . .	92, 98
Whiting v. Edmunds . . . . .	94 N. Y. 809, 814 . . . . .	227, 380
Whitney v. N. Y. and Atlantic R. R. Co. . . . .	32 Hun, 178 . . . . .	184, 185
—— v. Sherborn . . . . .	12 Allen, 111 . . . . .	121
Wilcox Silver Plate Co. v. Green . . . . .	72 N. Y. 17 . . . . .	580
—— v. Smith . . . . .	5 Wend. 281 . . . . .	275
* —— v. Wilcox . . . . .	48 Barb. 327 . . . . .	449
—— v. Wilcox . . . . .	4 Kern. 575 . . . . .	608
Wilkes v. Harper . . . . .	1 N. Y. 586 . . . . .	373
Williams v. Board of Supervisors . . . . .	78 N. Y. 561 . . . . .	561, 562
—— v. Buffalo . . . . .	25 Hun, 302 . . . . .	175
—— v. Fitzhugh . . . . .	87 N. Y. 444 . . . . .	25
—— v. Hadley . . . . .	21 Kans. 350 ; 30 Am. R. 430 . . . . .	224
* —— v. Ingersoll . . . . .	89 N. Y. 508 . . . . .	546
—— v. People . . . . .	24 N. Y. 409 . . . . .	352
—— v. Peyton . . . . .	4 Wheat. 77 . . . . .	378
† —— v. Whedon . . . . .	39 Hun, 98 . . . . .	529
—— v. Williams . . . . .	L. R., 1 P. & D. 29 . . . . .	527
—— v. Thorn . . . . .	70 N. Y. 270 . . . . .	687
Williamson v. McKinney . . . . .	52 N. Y. 382 . . . . .	230
† Willis v. Back . . . . .	2 East. 142 . . . . .	470
—— v. Mott . . . . .	36 N. Y. 436 . . . . .	566
—— v. Smith . . . . .	91 N. Y. 298 . . . . .	425
Willson v. Betts . . . . .	4 Den. 212 . . . . .	379
Wilson v. Robertson . . . . .	21 N. Y. 587 . . . . .	224, 382
Wiseman v. Lucksinger . . . . .	84 N. Y. 81 . . . . .	365
Withers v. Buckley . . . . .	20 How. (U. S.) 84 . . . . .	106
Womack v. State . . . . .	16 Tex. App. 178 . . . . .	341
Wood v. McChesney . . . . .	40 Barb. 417 . . . . .	188
—— v. Morehouse . . . . .	45 N. Y. 868 . . . . .	378
Woodhull v. Bohenblost . . . . .	4 Hun, 399 . . . . .	230, 231
Woodruff v. Young . . . . .	31 Hun, 420 . . . . .	328
* Woolever v. Knapp . . . . .	18 Barb. 265 . . . . .	449, 450
Woolley v. Woolley . . . . .	95 N. Y. 231 . . . . .	565
Worrall v. Munn . . . . .	5 N. Y. 229 . . . . .	5
Wright v. Page . . . . .	86 Barb. 441 . . . . .	815
Wurts v. Jenkins . . . . .	11 Barb. 546 . . . . .	514

## Y.

Yates v. St. John . . . . .	12 Wend. 74 . . . . .	378
† Young v. Wakefield . . . . .	121 Mass. 91 . . . . .	578

xxxviii NEW YORK REVISED STATUTES CITED.

UNITED STATES CONSTITUTION CITED.

	PAGE.
Const. U. S., art. 5 . . . . .	168

CONSTITUTION OF NEW YORK CITED.

	PAGE.		PAGE.
Const. N. Y., art. 1, § 1 . . . . .	188	Const. N. Y., art. 3, § 18 . . . . .	277, 624
art. 2, § 1 . . . . .	119	art. 6, § 18 . . . . .	275
art. 2, § 3 . . . . .	119	art. 6, § 19 . . . . .	276

UNITED STATES STATUTES CITED.

	PAGE.
U. S. Stat. 1841, chap. 9 . . . . .	428
1841, chap. 9, § 9 . . . . .	429

UNITED STATES REVISED STATUTES CITED.

	PAGE.
U. S. R. S., § 4233 . . . . .	474

NEW YORK REVISED STATUTES CITED.

FIRST EDITION.

	PAGE.		PAGE.
1 R. S., 26, §§ 48, 49 . . . . .	204	2 R. S., 81, § 60 . . . . .	332
225, § 46 . . . . .	203	88, § 86 . . . . .	164
226, § 52 . . . . .	203	89, § 87 . . . . .	418
350, § 16 . . . . .	267	185, § 8 . . . . .	4
388, § 4, sub. 3 . . . . .	29	173, 174, § 88 . . . . .	44, 363
389, § 5 . . . . .	561	449, § 17 . . . . .	332
419, § 8 . . . . .	561	R. S., pt. 2, tit. 4, chap. 6 . . . . .	188
614, § 1 . . . . .	512	pt. 3, chap. 1, tit. 2, art. 2 . . . . .	26
732, §§ 77-79 . . . . .	37	pt. 4, chap. 1, tit. 7, § 81 . . . . .	316
737, § 126 . . . . .	37, 38		

# SESSION LAWS CITED.

xxxix

## FIFTH EDITION.

		PAGE.
1 R. S., m. p., 346, § 46 [24]	. 386	3 R. S., 196, § 59 . . . 187
m. p., 348, § 61 [86]	. 386	

## SIXTH EDITION.

1 R. S., 924 . . . . . 411	3 R. S., 88, § 59 . . . 585
984, § 5 . . . . . 584	148, § 11 . . . 410

## SEVENTH EDITION.

1 R. S., 808, § 1 . . . . . 119	3 R. S., 2250, § 4 . . . 267
2 R. S., 1166 . . . . . 180	2290, § 27 . . . 471
1166, § 44 . . . . . 181	2401, § 79, sub. 3 . . . 619
1169, § 53 . . . . . 181	

## EDMONDS' EDITION.

1 R. S., 820, m. p., 850, § 16 . . . . .	. 267
--	-------

# SESSION LAWS CITED.

	PAGE.		PAGE.
1813, chap. 60, . . . . .	. 99	1870, " 529 . . . . .	. 58
1813, " 60 § 3 . . . . .	. 101	1871, " 639, § 2 . . . . .	. 53
1817, " 262, § 3 . . . . .	. 204	1872, " 580 . . . . .	. 199
1833, " 279, § 1 . . . . .	. 297	1872, " 629 . . . . .	. 629
1833, " 279, § 4 . . . . .	. 267	1873, " 646 . . . . .	310, 408
1837, " 466 . . . . .	. 137	1878, " 863, tit. 2, § 14 . . . . .	. 439
1848, " 173 . . . . .	. 187	1875, " 79 . . . . .	100, 101
1847, " 298 . . . . .	. 187	1875, " 370, § 4 . . . . .	. 198
1850, " 140, § 12 . . . . .	. 58	1875, " 370, § 44 . . . . .	. 198
1850, " 324, § 8 . . . . .	. 318	1875, " 370, § 104 . . . . .	197, 198
1850, " 324, § 5 . . . . .	318, 320	1875, chap. 370, § 106 . . . . .	. 199
1851, " 176 . . . . .	. 561	1875, " 392, . . . . .	. 58
1854, " 169 . . . . .	318, 319, 320	1875, " 567, § 24 . . . . .	. 230
1854, " 370, § 1 . . . . .	. 164	1876, " 176 . . . . .	. 100
1857, " 769 . . . . .	. 199	1876, " 176, § 1 . . . . .	. 101
1859, " 70, § 2 . . . . .	276, 277	1877, " 321 . . . . .	. 420
1859, " 261 . . . . .	. 164	1877, " 417 . . . . .	24, 165
1862, " 484, §§ 6, 7 . . . . .	. 494	1877, " 417, § 2 . . . . .	. 164
1864, " 406, §§ 2, 16, 21 . . . . .	. 174	1878, " 48 . . . . .	. 117
1864, " 555, § 42 . . . . .	. 180	1879, " 145, § 2 . . . . .	. 615
1864, " 555, § 45, sub. 10 . . . . .	. 181	1880, " 86 . . . . .	. 271
1864, " 555, § 83 . . . . .	. 230	1880, " 186 . . . . .	. 590
1865, " 453 . . . . .	. 88	1880, " 245, § 1, sub. 4 . . . . .	. 165
1866, " 467 . . . . .	. 199	1880, " 245, § 2 . . . . .	. 165
1867, " 406 . . . . .	. 180	1880, " 542 . . . . .	. 241
1867, " 512, tit. 3, § 3, sub. 22 . . . . .	320	1880, " 575 . . . . .	. 248
1867, " 790 . . . . .	318, 319, 320, 321	1880, " 582 . . . . .	. 624
1868, " 761 . . . . .	318, 319, 220, 321	1880, " 582, § 1 . . . . .	624, 625
1870, " 175 . . . . .	. 615	1881, " 75 . . . . .	. 320
1870, " 263, § 2 . . . . .	276, 277	1881, " 457 . . . . .	. 430

## xi SECTIONS OF CODE OF CIVIL PROCEDURE CITED.

	PAGE.		PAGE.
1881, " 531 . . . . .	550	1883, " 373 . . . . .	144
1882, " 65 . . . . .	367	1884, " 43 . . . . .	614
1883, " 353, § 13 . . . . .	240, 243, 244	1885, " 397 . . . . .	29
1883, " 410, § 109 . . . . .	615	1884, " 193 . . . . .	555
1883, " 410, § 170 . . . . .	553, 553	1884, " 230 . . . . .	457
1883, " 410, § 180 . . . . .	552	1885, " 343 . . . . .	466
1883, " 410, § 716 . . . . .	553, 554	1885, " 343 § 2 . . . . .	466
1883, " 410, § 820 . . . . .	586	1885, " 523 . . . . .	172
1883, " 296, tit. 3, § 14, suba. 15, 20 . . . . .	851	1886, " 593 . . . . .	316

## SECTIONS OF THE CODE OF PROCEDURE CITED.

	PAGE.		PAGE.
Code Pro., § 1, sub. 2 . . . . .	606	Code Pro., § 317 . . . . .	165
§ 90 . . . . .	629	§ 371 . . . . .	172
§ 297 . . . . .	24		

## SECTIONS OF THE CODE OF CIVIL PROCEDURE CITED.

	PAGE.		PAGE.
Code C. P., § 2 (of 1876) . . . . .	629	Code C. P., § 738 . . . . .	200
§ 73 . . . . .	492	§ 779 . . . . .	645
§ 365 . . . . .	380	§ 829 148, 149, 160, 482 . . . . .	316
§ 368 . . . . .	227, 380	§ 833 . . . . .	518
§ 373 . . . . .	227, 380	§ 835 . . . . .	267
§ 382 . . . . .	332	§ 934 . . . . .	503
§ 383 (of 1876) . . . . .	629	§ 982 . . . . .	91
§ 383, sub. 7 (of 1876) . . . . .	629	§ 999 . . . . .	604
§ 388 . . . . .	333	§ 1001 . . . . .	604
§ 392 . . . . .	333	§ 1013 . . . . .	604
§ 419 . . . . .	280	§ 1015 . . . . .	604
§ 449 . . . . .	522	§ 1200 . . . . .	280
§ 453 . . . . .	548	§ 1214 . . . . .	604
§ 468 . . . . .	522	§ 1221, sub. 3 . . . . .	373
§ 469 . . . . .	522	§ 1224 . . . . .	604
§ 470 . . . . .	522	§ 1226 . . . . .	604
§ 501 . . . . .	283	§ 1230 . . . . .	604
§ 503 . . . . .	283	§ 1231 . . . . .	605
§ 682 . . . . .	95	§ 1232 . . . . .	600
§ 683 . . . . .	95	§ 1279 . . . . .	604
§ 708 . . . . .	124	§ 1301 . . . . .	604
§ 723 . . . . .	91, 170	§ 1316 . . . . .	604
§ 724 . . . . .	169	§ 1323 . . . . .	241, 644



# SECTIONS CODE OF CRIMINAL PROCEDURE CITED. xli

	PAGE.		PAGE.
Code C. P., § 1335 . . .	88	Code C. P., § 2142 . . .	241
§ 1346 . . .	164	§ 2244 . . .	260
§ 1347, sub. 4 . . .	606	§ 2281 . . .	535
§ 1349 . . .	604	§ 2284 . . .	535
§ 1350 . . .	604	§ 2447 . . .	24
§ 1356 . . .	164	§ 2468 . . .	24, 25
§ 1405 . . .	387	§ 2471 . . .	25
§ 1501 . . .	228	§ 2481, sub. 5 . . .	328
§ 1515 . . .	448	§ 2481, sub. 6 . . .	409
§ 1532 . . .	640	§ 2481, sub. 11 . . .	328
§ 1538 . . .	448	§ 2568 . . .	139
§ 1539 . . .	448	§ 2663 . . .	473
§ 1619 . . .	195	§ 2717 . . .	328, 329
§ 1666 . . .	449	§ 2718 . . .	328, 329
§ 1696 . . .	557, 558	§ 2786 . . .	189
§ 1704 . . .	558	§ 2945 . . .	268
§ 1722 . . .	308	§ 3060 . . .	88
§ 1784 . . .	200	§ 3068 . . .	284
§ 1785 . . .	201	§ 3070 . . .	172, 208
§ 1786 . . .	201	§ 3228 . . .	444
§ 1788 . . .	184, 201	§ 3229 . . .	444
§ 1798 . . .	618	§ 3284 . . .	167
§ 1819 . . .	331	§ 3240 . . .	277
§ 1836 . . .	205	§ 3245 . . .	174, 175
§ 1843 . . .	326	§ 3246 . . .	165, 443, 444
§ 1871 . . .	44, 362	§ 3258 . . .	280
§§ 1871 to 1879 . . .	637	§ 3253, sub. 2 . . .	507
§ 1872 . . .	362	§ 3330 . . .	414
§ 1877 . . .	26	§ 3343, sub. 10, . . .	332
§ 2059 . . .	277	§ 3343, sub. 20, . . .	164, 606
§ 2129 . . .	242	§ 3347, sub. 11, . . .	139, 172
§ 2137 . . .	241	chap. 15, tit 4 . . .	26
§ 2141 . . .	241, 587	chaps. 18, 19 . . .	172

## SECTIONS OF THE CODE OF CRIMINAL PROCEDURE CITED.

	PAGE.		PAGE.
Code Crim. P., § 56, sub. 33 . . .	197	Code Crim. P., § 467 . . .	367, 369
§ 63 . . .	197	§ 485 . . .	368
§ 68 . . .	316	§ 517 . . .	368
§ 275 . . .	83	§ 518 . . .	367
§ 395, . . .	388, 344, 346	§ 518, sub. 2 . . .	368, 369
§§ 462-466 . . .	367	§ 548 . . .	368
§ 466 . . .	368	§ 549 . . .	363

## RULES CITED.

## SECTIONS OF THE PENAL CODE CITED.

---

	PAGE.		PAGE.
Penal Code, § 2 . . . . .	249	Penal Code, § 888 . . . . .	187, 186
§ 3 . . . . .	247, 251	§ 538 . . . . .	88, 85
§ 34 . . . . .	250	§ 544 . . . . .	86
§ 178 . . . . .	247, 248, 251	§ 569 . . . . .	289
§ 174 . . . . .	247, 250	§ 685 . . . . .	247
§ 178 . . . . .	247, 250	§ 714 . . . . .	818

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## RULES CITED.

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Rule 87, see note 88 . . . . .	92
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# Cases

DETERMINED IN THE

## FIFTH DEPARTMENT,

AT

GENERAL TERM,

October, 1886.\*

JULIA MARTIN, RESPONDENT, v. JESSE COLBY, APPELLANT.

42 1  
34ap422

*When a condition of a bond will be treated as an agreement — when specific performance thereof will be enforced — presumption as to an instrument having been under seal — what consideration will support an agreement — the court will not direct specific performance where a party is unable to perform his contract.*

On February 5, 1880, the defendant made to the plaintiff his bond in the penal sum of \$10,000, containing the condition " that if the said Julia Martin (the plaintiff), her heirs, executors, administrators or assigns shall pay to the said Jesse Colby (the defendant), his executors, administrators or assigns the just and full sum of fifty-eight hundred and fifty dollars, and the interest from the date hereof in one year from the date hereof, then said Jesse Colby, his heirs, executors or administrators shall execute and deliver to the said Julia Martin, her heirs, executors and administrators a good and sufficient warranty deed in fee simple, with the usual covenants, of the same lands in the town of Alden which are described in a certain deed this day executed by Levinus W. Cornell and wife to Jesse Colby, then this obligation to be void, else to remain in full force and virtue; and the said Julia Martin shall pay, in addition to the stated sum, for all improvements that the said Jesse Colby shall have done on the said lands during one year from the date hereof, and the said Jesse Colby shall have all the privileges of the said lands as he would have if this writing was not made."

On February 5, 1881, the plaintiff caused a tender to be made to the defendant of the amount she claimed was then due to him, and requested him to execute a deed of the lands. He having refused so to do, upon the ground that the bond had been canceled, the plaintiff brought this action to compel a specific performance of the agreement, and recovered a judgment therefor.

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\* Continued from volume 41 Hun.

*Held*, that the agreement to execute and deliver the deed of the lands constituted an agreement to sell them, and imposed upon the defendant a duty to convey the lands, which could be specifically enforced in this action.

The original bond was not produced upon the trial, and the copy used had no mark following the name subscribed to indicate that the original was sealed. but the language of the instrument declared that it was sealed

*Held*, that this was some evidence of the fact that the original bond was sealed.

That a sufficient consideration for the defendant's agreement was shown by proving that the conveyance, made at the same time to the defendant by Cornell, was made pursuant to an undertaking that the defendant should permit the plaintiff to purchase the property at the price mentioned in the bond.

On March 31, 1880, thirty-five acres of the land were conveyed by the defendant and his wife to the plaintiff, by a deed expressing the consideration of \$3,000, the plaintiff giving back a mortgage to secure \$2,200 of the purchase-money.

*Held*, that this did not necessarily operate as a satisfaction or rescission of the contract expressed in the bond.

That as the nature of the liability which the plaintiff might incur for the improvements, which might be made by the defendant, was such that she could not accurately measure their value, and as no means was provided by the contract for determining this question the provision for the payment for such improvements would be construed to create a liability rather than a condition precedent, and that the plaintiff was not required to cover by the tender the value of any improvements which the defendant might have made.

The defendant offered, but was not allowed, to prove that his wife had refused, and did refuse, to sign a deed conveying the lands to the plaintiff, the refusal of his wife to execute the deed having been alleged in his answer.

*Held*, that the court erred in refusing to receive the evidence.

APPEAL from a judgment, entered on a decision made at the Erie. Special Term.

The action was brought for the specific performance of an alleged contract to convey lands situated in the town of Alden, county of Erie.

On the 5th day of February, 1880, the defendant made to the plaintiff his bond in the penal sum of \$10,000, containing the condition "that if the said Julia Martin, her heirs, executors, administrators or assigns shall pay to the said Jesse Colby, his executors, administrators or assigns the just and full sum of fifty-eight hundred and fifty dollars, and the interest from the date hereof in one year from the date hereof, then said Jesse Colby, his heirs, executors or administrators shall execute and deliver to the said Julia Martin, her heirs, executors and administrators a good and sufficient warranty deed in fee simple, with the usual covenants, of the same, lands in

the town of Alden which are described in a certain deed this day executed by Levinus W. Cornell and wife to Jesse Colby, then this obligation to be void, else to remain in full force and virtue; and the said Julia Martin shall pay in addition to the stated sum for all improvements that the said Jesse Colby shall have done on the said lands during one year from the date hereof, and the said Jesse Colby shall have all the privileges of the said land as he would have if this writing was not made."

The premises referred to in this instrument contained 160 acres, and was described in three parcels, one of which consisted of thirty-five acres, upon which was a cheese factory and some other buildings. On the 31st day of March, 1880, this thirty-five-acre parcel was, by the defendant and wife, conveyed to the plaintiff by warranty deed expressing the consideration of \$3,000. And the plaintiff gave to the defendant a bond, with a mortgage upon the premises, to secure the payment of \$2,200 of the purchase-money. The plaintiff, on February 5, 1881, caused a tender to be made to the defendant of the amount she claimed was then due him of the purchase-money, and requested him to execute to her a deed of the remaining 125 acres. He refused to do this, and claimed that his bond had been canceled and surrendered up to him. Thereupon this action was brought to require him to perform by the conveyance of this 125 acres.

The trial court found that the defendant's bond remained operative and that the plaintiff was entitled to its performance, and directed judgment, which was entered against the defendant that he convey the land to the plaintiff on notice that the purchase-money is paid into court.

*C. F. Tabor*, for the appellant.

*L. P. Perkins*, for the respondent.

BRADLEY, J. :

It is contended on the part of the defendant that this bond does not constitute or contain any agreement of the defendant to support an action for specific performance. And this is urged upon the ground that by it he did not agree to sell, but only to execute, a deed upon a condition, that the plaintiff did not undertake to

purchase the premises, and that the bond was in fact made without consideration. The agreement to convey embraces that to sell, and the obligation, in form, imposed upon the defendant by his bond was the performance of the condition expressed in it as effectually as if it was in the form of a simple contract on his part to sell and convey. It is something more than a naked condition, which was that involved in *Palmer v. Fort Plain and C. P. R. Company* (11 N. Y., 376).

The condition of a bond expresses the purpose for which the obligation is assumed, and has the support of it for the purposes of the remedy. The obligation expressed in the instrument in question is to execute and deliver to the plaintiff a deed upon payment by her of the requisite amount at the time specified. No question applicable here arose in *Turk v. Ridge* (41 N. Y., 201). And while that case was correctly decided, some remarks there made by the learned judge were unnecessary to the result. (*Booth v. Cleveland Mill Co.*, 74 N. Y., 15-22; *Merrill v. Green*, 55 id., 270.) No form of words or phraseology is necessary to the creation of a contract obligation. It is sufficient that by the language used, the intention of the parties is fairly manifested, and when that is found in the phraseology employed, the instrument must be construed accordingly.

The seal furnishes a presumption of consideration which may be repelled. The original bond was not produced, and the copy used had no marks following the name subscribed to indicate that the original was sealed, but the language of the instrument declares that it was sealed, which is some evidence that the original bond was so.

And the evidence tends to prove, that the conveyance was made by Cornell to the defendant pursuant to an understanding between them that the latter should permit the plaintiff to purchase the property at the price mentioned in the bond, and that it was made at the same time as the conveyance to the defendant, in consummation of such understanding, founded upon reasons to which it is here unnecessary specifically to refer. The obligation of the defendant having been assumed, upon a consideration sufficient to support it, he was charged with the duty and legal liability to perform his undertaking. (2 R. S., 135, § 8; *Tallman v. Franklin*,

14 N. Y., 584; *Worrall v. Munn*, 5 id., 229; *McCrea v. Purmort*, 16 Wend., 460; *Justice v. Lang*, 42 N. Y., 524.)

The execution and acceptance of a deed of a portion of the premises between the parties, was not necessarily a satisfaction or rescission of the contract in question. It was a part performance, by consent of the parties, before the time designated for performance, and pursuant to some further arrangement between them, and the effect of such conveyance upon the defendant's obligation, is dependent upon the agreement which produced such partial performance. This is the subject of a conflict of evidence. The evidence on the part of the defendant tends to prove, that at the time of such conveyance of the thirty-five acres to the plaintiff, and pursuant to which it was made and taken, there was an agreement that the bond should be canceled. And he produces at the trial a written instrument, to which the signature of the plaintiff is subscribed, bearing even date with the deed to her, and distinctly stating that the bond is canceled and gives evidence to the effect that the plaintiff executed such written agreement. This is denied by the plaintiff, and the evidence on her part tends to prove that no such arrangement was made; that she did not subscribe any agreement to cancel the bond, and other evidence is given which it is claimed tends to impeach the instrument. The parties also disagree about the circumstances which led to the conveyance. While the evidence on the part of the plaintiff is that it was made, and the mortgage given at his request and for his accommodation, to enable him to raise money to pay off certain incumbrances then upon the premises, the evidence on the part of the defendant is directly to contrary, and to the effect that it was done wholly for the accommodation of the plaintiff and her husband.

These controverted facts were for the determination of the trial court upon the evidence; and we cannot say that the court has failed, by its finding of the facts against the defendant, to represent the truth of the occurrences between the parties. And in that view the defendant's bond remained operative and his obligation, on payment of the purchase-money remaining unpaid, continued, and required him to convey the residue of the land to the plaintiff. And the evidence on the part of the plaintiff tended to prove, and the trial court found, that the amount tendered and offered to the

defendant was a proper and requisite sum, and was a complete tender of performance on her part, by which she was entitled to receive conveyance of such residue. And that by his refusal the defendant was placed in default. This conclusion of the court is excepted to. And the only question presented by this exception, other than that of fact arising out of the conflict of evidence (the finding upon which we think was justified), is whether the plaintiff was required to cover by the sum tendered the value of the improvements the defendant had made upon the premises during the year.

It appears by the terms of the bond, that it was contemplated that the defendant might make some improvements during the year, and that if he did, the plaintiff should pay him for them in addition to the sum before mentioned in the condition of that instrument.

It will be observed that this was not in express terms embraced in the sum required to be paid as the condition upon which the right to a deed depended, but that his conveyance on payment by her of the purchase-price of the land rendered his obligation void, and if he failed, on such payment, to make to her the deed, his obligation should remain in force. And such is the interpretation that it should receive. The nature of the liability which might be incurred for the improvements he should make, might be such that she could not accurately measure the value of them. There was no means provided by the contract to arrive at their value. And in view of the circumstances, the provision referred to would seem to have been designed to create a liability, rather than a condition precedent for improvements, in the event the defendant made any, and such as were within the contemplation of the parties.

At the time the tender was made the defendant had not furnished and did not then furnish to the plaintiff any statement of the improvements made by him, or of the amount or value of them. He then, evidently, put his refusal to make the deed mainly on his claim, that the bond was canceled, and that no obligation remained to convey the residue of the premises. He says: "I did not put my refusal of the money tendered wholly on the ground that they didn't tender me any money for improvements, but on the ground that the contract was canceled; as to that I told them so, not wholly on that, but on the ground they did not tender me enough money;



but I didn't specify any sum nor any special demand. They said they didn't tender me any money for improvements."

It may be assumed that the defendant was married and had a wife at the time he made the bond. She is not a party. The defendant offered to prove that his wife has refused to sign, and will not sign a deed to the plaintiff of the 125 acres, and took exception to the rejection of the evidence. This evidence was probably offered to show, that the defendant could not specifically perform the obligation to give a deed with the stipulated covenants.

The trial court directed judgment that the defendant execute and deliver to the plaintiff a deed of conveyance with specified covenants, constituting what is known as a full covenant warranty deed. And to this conclusion exception was taken. And to the refusal of the court to determine that the deed should not contain any covenant against a claim or right of dower of his wife the defendant also excepted.

It will be presumed, when nothing appears to the contrary, that a party is able specifically to perform his undertaking to convey; but he is permitted to prove that he cannot, and such fact, when established, is in the way, partially or wholly, of that form of relief, because a party will not usually be directed, by judgment, to perform when he cannot. The deed which the defendant is, by the direction and judgment of the court, required to give, cannot be made unless his wife joins in its execution; and one made by him alone, with such covenants, will not answer the requirement of the judgment. (*Jones v. Gardner*, 10 Johns., 266; *Stevens v. Hunt*, 15 Barb., 17.)

If the court should become satisfied upon the trial that the wife would not execute the deed, the defendant would not be unqualifiedly directed by the judgment to convey with covenants covering her right of dower. And the plaintiff is not required to accept a conveyance less valuable than that which performance of defendant's contract requires. In such event the plaintiff could not take both such a deed as defendant could alone effectually execute, and damages for the deficiency in the conveyance, but the remedy would be for damages only. (*Sternberger v. McGovern*, 56 N. Y., 12; *Dixon v. Rice*, 16 Hun, 422.)

The defendant, in his answer, alleged the refusal of his wife to

execute the deed. It cannot now be said what effect should or would have been given, if received, to the evidence offered to prove that she refused to, and would not, execute the deed, but it was error to exclude it. And unless the plaintiff is willing to accept a deed of conveyance from the defendant, with covenants so qualified as to obviate that question, a new trial must be granted.

The defendant, by his obligation, undertook to make to the plaintiff a conveyance with the covenants as directed by the judgment, and she is entitled to it, or to the requisite compensatory damages, assuming that she is entitled to recover. (*Jones v. Gardner*, 10 Johns., 266; *In re Jane Hunter*, 1 Edw. Ch., 1, 6; *Burwell v. Jackson*, 9 N. Y., 535; *Delavan v. Duncan*, 49 id., 485-487.)

It is not apparent that the evidence of value of the premises could have any legitimate bearing except in the event, that the court should have finally determined that the plaintiff was entitled to relief other than that of specific performance of the contract, which might entitle such evidence to consideration. We think no error can be predicated upon the exception taken to its reception. There seems to be no other question requiring consideration.

The judgment should be reversed and a new trial granted, costs of this appeal to abide the event, unless the plaintiff stipulate, to so modify the judgment as to direct, that the conveyance be made subject to the inchoate right of dower of the person who was the wife of the defendant on the 5th day of February, 1880. And in that event the judgment be so modified, and as modified affirmed, without costs of this appeal to either party.

SMITH, P. J., and BARKER, J., concurred; HAIGHT, J., not sitting.

Judgment reversed and new trial ordered, costs of this appeal to abide the event, unless the plaintiff, within twenty days, stipulates to so modify the judgment as to direct that the conveyance be made subject to the inchoate right of dower of the person who was the wife of the defendant on the 5th day of February, 1880, and in that event the judgment be so modified, and as modified affirmed, without costs of this appeal to either party.

GEORGE HYLAND AND JOHN HYLAND, AS ADMINISTRATORS, ETC., OF GEORGE HYLAND, DECEASED, APPELLANTS,  
v. BERNARD BAXTER AND OTHERS, RESPONDENTS.

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*Payments made by an administrator to an infant will not be allowed — when an equitable claim for supplies and necessities furnished to the infant will be recognized — the Surrogate's Court has power to allow such a claim — sales from a trustee to infant beneficiaries will not be sustained.*

Upon an accounting of one George Hyland, as administrator of one Baxter, it appeared that Baxter died on May 27, 1862, intestate, leaving a widow, Bridget, and three infant children; that on June 5, 1862, the said George Hyland and the widow were appointed administrators; that Hyland took possession of the personal estate, consisting of livery property, continuing the livery business until August, 1862, when he sold the property on terms of credit, under which the last payment was not made until September, 1866. An inventory was made soon after the appointment of the administrators, but was not filed until in June, 1872; nor was any guardian appointed for the children until in May, 1872.

Upon the hearing before an auditor, appointed to examine the accounts of the administrators and report thereon, evidence was given tending to show that the widow and her family were substantially without means of support, other than such as were derived from her services and the estate of the deceased, except that a small amount was received by her from the rent of a house in her possession; that the administrator, Hyland, from time to time furnished her with money and articles of merchandise, which she received in her capacity as administratrix and appropriated to the support of the minor children.

*Held*, that as no general guardian had been appointed for the infant defendants, and no one was entitled to receive any portion of the fund in the hands of the administrators, the acting administrator had no legal right to hand over to his co-administrator any of the assets in his hands, or to furnish supplies for the family of the intestate at the expense of the estate.

That to establish an equitable right in behalf of the administrator to an allowance or credit, as against the estate of the children, the administrator must show that he acted with good faith, and that the necessities of the minors required the expenditure of the moneys.

That the Surrogate's Court had jurisdiction to fully adjust and award any equities existing between the parties and in behalf of Hyland.

*Hyland v. Baxter* (98 N. Y., 610; affirming S. C., 31 Hun, 354).

That the fact that it might be difficult to make the apportionment between the children, so as to definitely and correctly charge their respective shares with the amounts supplied, would not justify the court in refusing to make such apportionment, as the same difficulty would have existed in the accounting of the widow, if she had been the general guardian of all the children, as they were of one family.

A rule which requires the severance of a family for the protection of a guardian in his account, would be harsh and the consequences unnatural.

The evidence showed that a considerable portion of the amount claimed by the administrator was for goods sold from his store, he being engaged in carrying on mercantile business for profit.

*Held*, that unless special reasons were shown to exist in this case those amounts should be disallowed under the rule prohibiting trustees from dealing with infant beneficiaries.

APPEAL from a decree of the surrogate of Livingston county, made upon accounting of George Hyland, as Administrator, etc., of Bernard Baxter, deceased.

It appears that Bernard Baxter died intestate, May 27, 1862, leaving Bridget Baxter, his widow, and three infant children: Mary, aged seven years; Bernard, aged two years; and Ella, aged seven months. And June 5, 1862, Bridget Baxter, the widow, and George Hyland were appointed administrators. The personal estate consisted of livery property, amounting, as per appraisal and inventory, to \$1,481.

The administrator, Hyland, took possession of the property, and for a short time, and until he could sell it, continued the livery business. He sold it in August, 1862, on terms of credit, which required monthly payments of twenty-five dollars each and interest. The purchase-money was received by him in installments, and the payment was completed in September, 1866. An inventory was made shortly after the appointment of the administrators, but it was not filed until June, 1872, when it was done pursuant to the order of the surrogate, made in proceeding instituted by the guardian of the infants. There was no guardian for the infants until Wendell Zimmer was so appointed in May, 1872. And upon his petition the order was made, pursuant to which Hyland filed his account as administrator. It was then referred to an auditor, to examine and report thereon.

Upon the hearing, the evidence tended to prove that the widow and her family were substantially without means of support, other than such as were derived from her services and the estate of the deceased, except that a small amount was also received by her from the rent of a house in her possession; and that from time to time the administrator, Hyland, furnished her with money and articles of merchandise, and paid some taxes assessed to her on houses and lots in her possession.

## FIFTH DEPARTMENT, OCTOBER TERM, 1886.

The auditor reported that the proceeds of the personal property which came to Hyland's hands were.....	\$1,481 00
And interest as stated in his account.....	140 00
Interest surcharged.....	100 00
And receipts from use of the livery property between May 26 and July 31, 1862.....	151 87
Making.....	\$1,872 87
And that he should be credited with the payment of debts of intestate, funeral expenses and commissions, amounting to.....	631 60
Leaving in his hands for distribution as of September 1, 1867.....	\$1,241 27
Treating one-third as paid to the widow.....	413 75
Leaving for distribution to the next of kin.....	\$827 52
Adding interest from September 1, 1867, to time of his report, September 19, 1874.....	\$415 23
Less commission on that sum.....	10 38
	404 85
Producing a balance in his hands.....	\$1,232 37

The auditor found that the administrator, Hyland, paid the widow chiefly in articles of merchandise, with some money, equal to the distributive shares of her and the children in the estate, being the same charged in his account, intending such as payment of their distributive shares, but that such payment in his opinion was unauthorized by law, and could not be allowed to him as a credit upon his accounting as administrator in that court; that she received the money and merchandise, claiming them in her right as administratrix, and appropriated the same to the support of the minor children. And on bringing into court the widow, as a party to the proceeding of accounting, the auditor afterward made a further report that she had expended the distributive shares of the minor children "in providing for their necessities during their minority, and that if she had expended the same as their general guardian, the said payment would have been allowed to her, on her accounting as guardian," but that in his opinion she, as administratrix, had no

legal right to make such payments, and such court had no power to allow such payments to the administrators as a credit. And consequently they must be jointly charged as against the next of kin, but that, as between the administrators, Hyland was entitled to a decree that the widow pay the same, and that she repay to him so much as he shall pay to the next of kin.

The surrogate sustained exceptions to the finding of the auditor, that the money and merchandise received by the widow from Hyland were appropriated by her for the support of the minor children, or for their necessary support during their minority. And in other respects apparently confirmed the report, and a decree was entered December 22, 1876, from which this appeal was taken by the administrator, Hyland, who afterwards died, and the appeal was continued in the name of the present appellants. And the widow having afterwards also died, Bernard Baxter, as administrator of her estate, was substituted as a respondent.

*Oscar Craig*, for the appellants.

*D. W. Noyes* and *Charles J. Bissell*, for the respondents.

BRADLEY, J.:

The embarrassment of the appellants arises mainly out of the failure of their intestate to observe the statutory direction to him as administrator of the estate of Bernard Baxter, deceased. He, as such, took possession of the personal estate and converted it into money. He was called upon by the widow of the decedent, his coadministrator, for money and for merchandise, and he furnished them to her. She and her three minor children constituted her family, and all of them remained at home with her for about five years after the death of her husband, when the eldest child, Mary, went out to work, and did so a considerable portion of the time thereafter.

It may fairly be inferred or assumed, that the money and merchandise so received by the widow of Hyland was used by her in the support of her family, and that some benefit was thus received by all of the children. And it is quite evident, as the court below understood, that Hyland furnished to the widow the merchandise and money in good faith, believing that he was properly supplying the family with the means of support from the estate in his hands

of his intestate, and that it was used for such purpose. The family had no means of support other than from the labor of the mother, and this personal estate in the hands of Hyland, except a small amount of rent received for the use of a house, until the expiration of five years after the death of Baxter, when some relief was furnished by the absence and labor of the one daughter. The acting administrator had no legal right to hand over to his coadministrator any of the assets in his hands, or to furnish supplies for the family of his intestate, at the expense of the estate.

The infant children were not represented by any general guardian, and no one was entitled to receive for them any portion of the fund in his hands. And the question arises whether any equities exist in behalf of this administrator, which fairly require any allowance or credit to him, as against the shares of the children in the estate. When the rights of infants are involved, a trustee is usually held to a strict accountability in the line of his duty as such. (*Howell v. Mills*, 53 N. Y., 322.) And equities are found in his behalf in case of departure from his legal duty, in the event only of entire good faith on his part, and when it is subservient to the necessities of the minors beneficially interested. The denial of the right to break in upon the capital of funds held for infants, or to obtain reimbursement by the trustee or guardian so doing, has been somewhat rigorously adhered to. (2 *Perry on Trusts*, § 618; *Walker v. Wetherell*, 6 Vesey, 473.)

But in this State that rule is not inflexible, and circumstances may arise to justify the impairment of the principal of the fund for maintenance, and when they have so existed and produced expenditure made in good faith, equitable considerations will be applied to reimburse the trustee. (*In re Bostwick*, 4 Johns. Ch., 100; *Hill v. Hanford*, 11 Hun, 536.) Such allowance of credit, however, for past disbursements will be given only in cases where the court would have permitted it to be made on prior application in behalf of the infant beneficiary. While the failure of the administrator to file the inventory of the estate or to render and settle his account until required by proceedings taken against him for those purposes are circumstances of negligence and disregard of duty, they do not necessarily deny to him good faith and purposes in dealing with the fund.

The personal estate which came to him was such, that he was required to sell it on a long installment credit, which did not wholly result in proceeds to him until four years afterwards, and in the meantime the widow was calling upon him for money and goods for the use of her family which he supplied, and which was thereafter continued in like manner. The view of the auditor, as expressed by his opinion, was that the Surrogate's Court had no power to consider the equities, if any existed in behalf of the administrator, Hyland, with a view to allowance to him of any credit for the moneys and merchandise so advanced by him. And the surrogate did not, in his opinion, expressly adopt or disaffirm that proposition. He placed the confirmation of the report on other grounds.

At all events the apprehension of want of power in that court to treat the equities claimed by Hyland, it seems, induced him to bring an action in the Supreme Court for such alleged purposes, in which he, failing to get relief at the trial court, sought review at the General Term, where the judgment was affirmed (*Hyland v. Baxter*, 31 Hun, 354), and on appeal to the Court of Appeals it was there held that the decree of the Surrogate's Court was *res judicata*, because that court had jurisdiction to fully adjust and award any equities existing between the parties and in behalf of Hyland, and that his remedy and relief, if he was entitled to any, must be found in the review of such decree, and the judgment was affirmed. (98 N. Y., 610.)

If it be assumed that the administrator was equitably entitled to allowance of credit in his account for moneys furnished by him to the support of the infant beneficiaries, there is some difficulty in making the apportionment between them, so as definitely and correctly to charge their respective shares with the amounts supplied. This is one ground upon which the surrogate put his conclusion as appears by his opinion. And such was the view expressed in the opinion of the General Term on review of the judgment in the action before mentioned on the facts there presented. It is contended that by such decision the questions here were disposed of adversely to the appellants.

That was a review of the findings of the trial court, and they were entitled to the most favorable view which could legitimately be



taken of them upon the evidence. And, as appears by the determination finally made by the Court of Appeals, such question was not properly in the action for consideration. Although the matter of the accounting and determination were theoretically had before the surrogate, the auditor was instrumental in taking the evidence and making the report upon which the decree was directed. And his view that there was no power in that court to determine the equities, if any there were, excluded from his consideration that question. And it is not apparent that the surrogate entertained a contrary view of the jurisdiction of his court in that respect. The question at least was one then not free from difficulty. And there is reason to apprehend, that the subject of controversy here may not have received the attention which it would have had if the power to extend the inquiry beyond the legal duties of the administrator, and to equitable considerations, had been clearly assumed by the Surrogate's Court. The auditor found substantially that these funds went to the support of the family. There is no specific finding of necessity of the infants for such contribution to their maintenance. And in the auditor's view of want of power, such fact was necessarily deemed by him of no importance.

The finding of such fact we cannot say is not justified by the evidence. It tends to prove that on the death of Baxter the family were substantially without means of support, other than such as the estate of the decedent might supply. The question of apportionment between the infants of the fund, which may be deemed as applied to their joint maintenance and support, is one of some difficulty. But it does not appear that no means are, or can be, furnished by the evidence to apply, to greater or less extent, a rule for that purpose. The question of its accuracy must necessarily be that of judgment, having in view all the circumstances, which should be carefully exercised for the protection of their interests, respectively.

It may be seen that the same difficulty may have existed in the accounting of the widow, if she had been the general guardian of all the children, as they were one family. A rule which requires the severance of a family for the protection of a guardian in his account, would be harsh, and the consequence unnatural. This matter should go back to the surrogate for rehearing, unembarrassed by any question of power or jurisdiction.

But unless special reasons appear, and are applicable to the account for merchandise rendered in this case, it should not be allowed as against the infants' fund. The permission of a trustee to deal with infant beneficiaries, by selling to them his property, and thus charging the fund, cannot, without liability to great abuse, be permitted. And the rule which ordinarily denies such right is, for obvious reasons, a salutary one.

The administrator was in the mercantile business. A considerable portion of his account rendered is for goods sold from his store. This business was carried on for profit. How much profit was within the prices charged does not, and probably cannot, appear. While there may be circumstances which will justify the allowance of such a claim, and when credit should be permitted, it is safer, generally, to apply the rule somewhat rigorously against the allowance of such dealing with the funds of infants by trustees than to indulge departure from it.

In the view taken of this case, we see no basis upon which direction can be given here which will enable the parties to obviate a rehearing. The decree should, therefore, be reversed and a rehearing had of the matter of accounting in the Surrogate's Court, costs of this appeal to abide the final award of costs.

SMITH, P. J., and BARKER, J., concurred.

Decree reversed and rehearing ordered in the Surrogate's Court of Livingston county, costs of this appeal to abide the final award of costs.

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THE FIRST NATIONAL BANK OF UNION MILLS,  
APPELLANT, v. JUDSON H. CLARK, RESPONDENT.

*Certificate of deposit — when a promise to pay will be implied therefrom — what facts establish a transfer thereof.*

On December 5, 1882, the defendant, a private banker, discounted a note for \$8,500, made by Knox Brothers to, and indorsed by, Sliney & Whelan, upon the oral understanding that the proceeds should not be paid until the fifteenth of the month. The defendant's cashier then gave to Sliney & Whelan an instrument in the following form: "Deposited by Sliney & Whelan with Judson

H. Clark, banker, Scio, N. Y., December 5, 1882; discount \$3,412.50." On the same day this instrument was delivered by Sliney & Whelan to the plaintiff, at its bank, with a check for \$3,412.50, drawn by them upon the defendant, payable to their own order ten days after date, and indorsed by them, the plaintiff then paying to them that amount, less interest for thirteen days. Knox Brothers and Sliney & Whelan having failed before December fifteenth, and the defendant having failed to pay the amount named in the instrument to the plaintiff, this action was brought to recover the same.

*Held*, that the certificate *prima facie* represented an undertaking on the part of the defendant to pay the sum mentioned in it to the depositors on demand, and that a transfer of the certificate would transfer all the right possessed by the depositors against the defendant in respect to the deposit.

That even if this were not so, yet as the evidence produced upon the trial was sufficient to enable the jury to find that the intention of the parties to the transaction was to effect a transfer of the claim against the defendant, from Sliney & Whelan to the plaintiff, and that this transfer was made, the court erred in directing a nonsuit upon the ground that the plaintiff had failed to show an assignment of the claim.

APPEAL from a judgment, entered on a nonsuit directed at the Allegany Circuit.

The defendant was a private or individual banker at Scio, N. Y. The evidence tends to prove that on the 5th day of December, 1882, Sliney & Whelan indorsed and presented a note, made by Knox Brothers for \$3,500, to the defendant's bank for discount, and that it was there discounted with the oral understanding that the proceeds should not be paid until the fifteenth of the month, and thereupon the defendant's cashier gave to Sliney & Whelan a deposit check or certificate in the following form :

"DEPOSITED BY SLINEY & WHELAN

WITH

JUDSON H. CLARK, BANKER,

Scio, N. Y., December 5th, 1882.

Discount, \$3,412.50.

F. M. BABCOCK."

That on the same day this deposit check was delivered by Sliney & Whelan to the plaintiff, at its bank, and with it a check drawn by them upon the defendant, payable to their own order ten days after its date, and indorsed by them for \$3,412.50, was also delivered to the plaintiff; that the plaintiff then advanced or paid to

them that amount, less interest for thirteen days; that on the seventh December the two checks were inclosed by the plaintiff to the defendant in a letter asking return in New York exchange, and on the nineteenth they were returned by the defendant to the plaintiff with the statement that there were "no funds to meet it," and that afterwards the defendant refused, on presentation of the checks and on demand, to pay the amount to the plaintiff. It also appeared that after the deposit check was made, and prior to the fifteenth December, Knox Brothers and Sliney & Whelan failed and made a general assignment for the benefit of their creditors. The defendant's motion for a nonsuit, on the ground that the plaintiff had failed to show an assignment of the claim from Sliney & Whelan to it, was granted and the plaintiff excepted.

*Ansley & Davis*, for the appellant.

*Rufus Scott*, for the respondent.

BRADLEY, J. :

The question presented here is whether the evidence was sufficient to permit the conclusion that the plaintiff derived from Sliney & Whelan title to the alleged claim against the defendant for the amount of the deposit. Assuming that Babcock represented the defendant in making it, the certificate was in effect an acknowledgment by the latter that the sum mentioned had been deposited in his bank, in the manner so indicated. This certificate contains no express promise to pay, and it is, therefore, contended that it is nothing more than a mere receipt in its legal import and effect.

In *Hotchkiss v. Mosher* (48 N. Y., 482), it was remarked by LEONARD, C., that "a simple certificate" (like the one there in question) "is not the basis of an action, like a promise in writing, but would be evidence like a receipt to raise an implied promise to pay, in an action for money had and received." And Daniel, in his work on Negotiable Instruments, has adopted the same proposition. (Sec. 1704.)

In that case the action was brought to recover for the alleged conversion of some promissory notes, to which the plaintiff claimed title. One question raised was whether the plaintiff had paid the defendants for the note. It appeared that for a portion of the sum

claimed to have been paid, the defendants had given the plaintiff a certificate to the effect that he had deposited such amount with the defendants. And it was held that parol evidence was competent to prove that the money for which the certificate was made was, in fact, received in payment for the notes. The learned judge there said the certificate "contained no promise on the part of the defendants, and if it had, the portion which operated as a receipt for money was quite as capable of separation from that part which evidenced a contract as in the case of a bill of lading." The question whether a promise would be implied in such a certificate to pay, was not in *Hotchkiss v. Mosher*.

So far as it contained the elements of a receipt, merely as such, it was treated as subject to explanation and modification by parol evidence, and this was clearly right as there illustrated. (*Meyer v. Peck*, 28 N. Y., 590; *Abbe v. Eaton*, 51 id., 410.) But the instrument here is *prima facie* evidence that the amount stated in it was received by the defendant as a deposit and, therefore, the certificate furnished the evidence of an implied obligation of the defendant to pay the amount to the depositors, or to those succeeding to their rights.

In *Payne v. Gardiner* (29 N. Y., 146; affirming S. C., 39 Barb., 634) an action was supported upon a certificate containing no express promise to pay; and see *Pardee v. Fish* (60 N. Y., 265; affirming 67 Barb., 407). In none of these cases was the question here necessarily considered, although it was somewhat involved in the facts upon which *Payne v. Gardiner* was determined.

In *Long v. Strauss*, recently decided by the Supreme Court of Indiana (reported in 6 N. E. Rep., 123; 7 id., 763, and in 34 Alb. Law Jour., 71 and 152), it was held that a mere certificate of deposit was a contract, having the effect of an acknowledgment of receipt of money and a promise to pay it, although no promise was expressed; and in *Smiley v. Fry* (100 N. Y., 262) the character of a certificate of deposit, as distinguished from a promissory note, and a deposit, as distinguished from a loan, are considered.

We think the certificate in question *prima facie* represented an undertaking on the part of the defendant to pay the sum mentioned in it to the depositors on demand. It declares that they have deposited such amount with the defendant; the law supplies by implication

such undertaking. In that view a transfer of the certificate would have the effect to transfer all the right possessed by the depositors against the defendant in respect to the deposit. But without treating the certificate as a contract to pay on demand there was sufficient in the evidence to send the case to the jury. It was necessary, to the support of the action, to find a transfer to the plaintiff of the claim against the defendant. The check drawn by Sliney & Whelan, and delivered to the plaintiff, not having by its terms been drawn on a particular fund, did not operate as an equitable assignment of the claim within the law of this State. (*Attorney General v. Continental Life Ins. Co.*, 71 N. Y., 325.) The rule is otherwise, in some of the other States, when the check or draft in fact covers and corresponds in amount with the entire fund in the hands of the drawee.

The evidence given of the transaction between the depositors and the plaintiff, was susceptible of a construction, and permitted the conclusion, that a transfer of the claim was made to the plaintiff in any view which may be taken of the nature of the certificate of deposit. It is sometimes designated in the evidence as a deposit check.

The member (Sliney) of the firm who did the business says he took this deposit check to the plaintiff, and gave the firm check on the defendant banker to it; that at the time he transferred the claim to the plaintiff, he transferred the deposit check to it, and the plaintiff's cashier gave him the money on it. And on his cross-examination he is asked: "By transferring this deposit check, you mean you simply delivered it to Mr. Sill? A. Yes sir; I got the money on it. Q. Did you do anything more? A. I gave him the check on Mr. Clark's bank." And Sill, the plaintiff's cashier, says that Sliney came to him at the bank, talked about a claim he had against the defendant's bank, produced the deposit check, and said he had so much money in his bank, the proceeds of a note discounted there, had agreed to wait ten days, and wanted to use the money, and wished to have the plaintiff "discount those papers; and I let him have the money." And then follows: "Q. What did you discount, the claim or the check? A. The claim. Q. Then you purchased the claim that he then stated he had against Clark? A. Yes, sir. Q. What was the check giver for? A. To draw the money."

There was sufficient to enable the jury to find that the intention of the parties to the transaction was to make and take a transfer of the claim against the defendant, and that it was consummated by them. No formal words of transfer were requisite to produce such result. It will answer if the transaction was characterized by the evidence as such. The plaintiff paid substantially the full amount of the claim. The money advanced did not necessarily purport to be a loan to Sliney & Whelan, but may be construed as payment for the claim represented by the deposit, the delivery and taking the certificate of deposit as the evidence it furnished of the claim, and the check as the means to enable the plaintiff to draw the amount of it from the defendant's bank. At all events, the jury were authorized to so infer.

It appears sufficiently for that purpose by the evidence of both Sliney and Sill, that they assumed that the claim was transferred to the plaintiff, and that the latter took title to it. The united understanding of those parties to that effect, in view of the purpose and circumstances of the transaction, was sufficient to fairly present that question. And the evidence may be so construed as to permit the conclusion that their minds met at the time in that respect, and produced such result, and for that purpose effect is to be given to the transaction itself, as well as to the words used to ascertain what they intended to and did accomplish. All which, as well as the matter of credibility of the witnesses, were for the jury. (*Risley v. Phenix Bank*, 83 N. Y., 318.)

The evidence was also sufficient to permit the jury to find that person who received the note at the defendant's bank and made the certificate of deposit was authorized to do so, and represented the defendant in what he did, and that the certificate was that of the latter for the purposes for which it purported to have been made.

These views lead to the conclusion that the case should have gone to the jury on the evidence as it stood when the motion for nonsuit was made and granted. No facts now appear to render the failure and consequent insolvency of the makers and indorsers of the note, alleged to have been discounted by the defendant, important.

Other considerations might arise if the discount of the note had not become perfected before such failure, but existed in executory agreement until after it occurred. (*Benedict v. Field*, 16 N. Y.,

595; affirming S. C., 4 Duer, 154.) But, on the evidence presented by the record, there is no support for the contention that the agreement to discount the note and give credit for the proceeds remained in executory agreement of the parties to that transaction at the time of such failure, and it is unnecessary to give that question any consideration.

The judgment should be reversed and a new trial granted, costs to abide the event.

SMITH, P. J., BARKER and HAIGHT, JJ., concurred.

Judgment reversed and new trial ordered, costs to abide event.

JOHN M. SMITH, APPELLANT, v. SETH A. TOZER,  
RESPONDENT, IMPLEADED, ETC.

*Receiver in supplementary proceedings — the title to only such real estate of the debtor as lies within this State is vested in him — Code of Civil Procedure, sec. 2468.*

Upon an appeal by the plaintiff from an order made at a Special Term denying his motion that the court direct and require the defendant to execute and deliver to the receiver — appointed in supplementary proceedings instituted upon the judgment recovered in this action — a conveyance of his interest in lands situate in the State of Illinois, and punish him, for contempt, because of his disobedience of an order of the county judge of Ontario county directing him to make such conveyance:

*Held*, that the order should be affirmed.

That the power conferred by sections 297 and 298 of the old Code upon the judge acting in such proceedings to order any property of the judgment debtor, not exempt from execution, to be applied towards the satisfaction of the judgment, ceased upon the repeal of these sections by chapter 417 of 1877.

That although this court may and will exercise its equity powers at Special Term upon motions to compel conveyances to be made to receivers, in actions where the facts and circumstances are such as not to require a trial of issues in an action brought for the purpose of determining the question upon which the right to relief depends, yet it could not make the order applied for in this case, for the reason that the title to the real estate in Illinois was not vested in the receiver, as section 2468 of the Code of Civil Procedure, providing for the vesting of the property of the judgment debtor in the receiver, expressly excepts "real property," the title to which is "only" to vest in him from the time when the order, or a certified copy thereof, is filed with the clerk of the county where



it is situated, thereby requiring the *situs* of all real estate, to be vested in him, to be within the limits of this State.

That the plaintiff's remedy was by a judgment creditor's action under the provisions of article 1 of title 4 of chapter 15 of the Code of Civil Procedure.

APPEAL from an order of the Monroe Special Term, denying the plaintiff's motion for an order directing and requiring the defendant to execute and deliver to a receiver conveyances of his interest in lands situate in the State of Illinois, and to punish him for contempt for disobedience of the order of the county judge of Ontario county directing him to make such conveyance.

*H. M. Field*, for the appellant.

*Spencer Gooding*, for the respondent.

BRADLEY, J. :

The plaintiff recovered, in an action in this court, judgment against Seth A. Tozer and another defendant, upon which execution against the property of the defendants was returned unsatisfied. Thereupon, proceedings supplementary to execution were instituted before the county judge of Ontario county against the defendant Seth A. Tozer, and, after his examination, a receiver of his property was appointed by the order of such county judge, and by the order such defendant was directed to execute and deliver to the receiver "a proper assignment and conveyance of all his lands and real estate wherever the same are situated, and particularly the lands and real estate in the counties of Williamson and Platt, in the State of Illinois." This order was duly filed and recorded in the office of the clerk of Ontario county, January 19, 1886. And the receiver having duly qualified, served the defendant with such order, and thereafter presented to him for execution quit-claim deeds of the Illinois lands in question and requested him to execute them, which the defendant refused to do.

This motion was then, upon due notice to the latter, made and denied.

On the part of the plaintiff it is contended that the order of the county judge was an effectual requirement for the execution of a conveyance to the receiver of such lands, and that his refusal to do so charged him with contempt, and subjected him to punish-

ment as the consequence. No question is made as to the manner of bringing him before the court for that purpose; and it is unnecessary to inquire whether it could be done otherwise than by an order to show cause. The question is one of power of the judge to direct by order the execution of the conveyance to the receiver. It was within the power of the judge in such proceeding given by the old Code to order any property of the judgment debtor, not exempt from execution, to be applied towards the satisfaction of the judgment (sec. 297) and to appoint a receiver with ample powers to consummate the purposes of such order. (Sec. 298.) And it was held that those provisions made an order of the judge before whom the proceedings were had effectually operative upon the judgment debtor in respect to his lands situated outside the State. (*Fenner v. Sanborn*, 37 Barb., 610.) In that view, the inquiry here is whether there has been any modification of the statute to deny such effect to the order in question. Those sections were repealed by Laws of 1877 (chap. 417). And the Code of Civil Procedure supplies all the provisions now relating to proceedings supplementary to execution as such.

The power of the judge in them is wholly dependent upon the statute. There is no remaining provision of the statute authorizing the judge to order the application towards the payment, or the delivery, or transfer, to the receiver for such purpose of any other than personal property of the judgment debtor. (Code Civil Pro., § 2447.) The direction in the order to assign or convey the real property, situated in the State of Illinois, was not within the power of the judge and, therefore, the judgment debtor was not in contempt. The judge may appoint a receiver, in whom the property of such debtor becomes vested by force of the statute, subject to certain exceptions. (*Id.*, 2468.) The powers of the receiver are ample to reach and make available the property of the judgment debtor within the jurisdiction of the court, and there is no apparent reason why aid may not be given, by the direction of the court, requiring him to transfer to the receiver any of his property outside the State which becomes vested in the receiver by virtue of his appointment. The equity power is inherent in this court, having jurisdiction of the person of a judgment debtor to require him to transfer to the receiver any property so vested in the latter, when

such transfer is necessary to its appropriation by him for the purposes of the trust, although such property is beyond the jurisdiction of the court. (*Mitchell v. Bunch*, 2 Paige, 606-615; *Bailey v. Ryder*, 10 N. Y., 363; *Fenner v. Sanborn*, 37 Barb., 610.) And for other purposes the court, having like jurisdiction of the party, has frequently exercised its power of requiring him to perform acts relating to property beyond the State, when his duty to do so has been judicially declared. (*Newton v. Bronson*, 13 N. Y., 587; *Gardner v. Ogden*, 22 id., 327; *Williams v. Fitzhugh*, 37 id., 444; *Shattuck v. Cassidy*, 3 Edw. Ch., 152.) This court, in an action by the receiver, might require the defendant to transfer or convey to him any property vested in him, which may be in another State when such transfer or conveyance is necessary to its proper appropriation in the execution of the trust. And this court may and will exercise equity powers at Special Term, upon motions, in actions, when the facts and circumstances are such as not to require a trial of issues in an action for the proper determination of the questions upon which the right to relief depends. (*Wetmore v. Law*, 34 Barb., 515-517; *Hale v. Clauson*, 60 N. Y., 341.)

Although this is a special proceeding, it is such in the action, and auxiliary to the purpose of enforcing the collection of the judgment, which is one of the purposes for which the action was brought. And the legitimate remedies attendant upon the proceeding, and to render it effectual, so far as the orders of the court may be required, are taken as in the action. When the receiver was appointed he became subject to the direction and control of the court. (Sec. 2471.) No dispute of the facts appeared by the papers upon which this motion was heard, and the question presented is whether the direction asked for came within the power of the court.

This, in the view taken, depends upon the right the receiver took by his appointment, by force of the statute, to the property in question. The statute provides that the property of the judgment debtor is vested in the receiver from the time of filing the order appointing him, subject to the exceptions that real property is vested in the receiver, only from the time when the order or a certified copy is filed with the clerk of the county where it is situated, etc. (Code Civil Pro., § 2468.) The real property in Illinois cannot

come within the exception, nor is any real property vested in the receiver which does not come within it, because, by the terms of the section, all the real property vested in the receiver is that embraced within the exception, and its *situs* must be in this State.

If the exception by qualification in terms had limited the real property mentioned in it to that situated in this State, the vesting provision of the section might have a broader construction, but as it is, the only real estate which the receiver is permitted to take, by force of this section is that which is situated in a county where the order may be filed. And our attention is called to no other provision of the statute enlarging the power of a receiver appointed in such proceeding in the respect in question. The plaintiff, however, is not without remedy. The provisions taking the place of the statutory creditors' bill for discovery, etc., authorized by the Revised Statutes (pt. 3, chap. 1, tit. 2, art. 2), and somewhat enlarging them, furnish a requisite remedy (Code Civil Pro., chap. 15, tit. 4, art. 1), as in such an action the court may, by judgment, appoint a receiver, and direct the judgment debtor to convey to him, etc. (Id., § 1877.) The difficulty in the way of relief by motion here is found in the qualified power of the receiver. He is not vested with the real property of the debtor situate without the State and, therefore, could not by action, or any proceeding *in invitum*, acquire a conveyance from him.

The views taken lead to the conclusion that the order should be affirmed.

SMITH, P. J., and BARKER, J., concurred; HAIGHT, J., not sitting.

Order affirmed, without costs.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
 THE SEMINARY OF OUR LADY OF ANGELS, APPELLANT AND RESPONDENT, v. THOMAS M. BARBER AND OTHERS, AS ASSESSORS, AND GALEN MILLER, AS SUPERVISOR OF THE TOWN OF LEWISTON, NIAGARA COUNTY, NEW YORK, APPELLANTS AND RESPONDENTS.

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*Taxation — exemption of buildings, and the lots on which they stand, of colleges — 1 Revised Statutes, 888, section 4, subdivision 3, as amended by chapter 397 of 1883 — duty of assessors in entering property omitted from the roll of last year.*

The policy of this State, as displayed in the laws providing for the exemption from taxation of the property of colleges, incorporated academies and other seminaries of learning, has been from an early day to encourage, foster and protect corporate institutions of religious and literary character, because the religious, moral and intellectual culture afforded by them were deemed, as they are in fact, beneficial to the public, necessary to the advancement of civilization and to the promotion of the welfare of society.

Although the statute does not in terms prescribe the purposes for which the lot on which the buildings are situated may be used, nor its dimensions, yet a reasonable interpretation thereof requires that the lot be devoted to no use other than that which is necessary or fairly incident to the use and purposes of the institution, and that its dimensions be governed by the reasonable and proper uses to which it is applied, rather than by its magnitude when it is within reasonable limits in that respect.

That as suitable recreations and physical exercise are deemed requisite to health and successful mental culture, the means and opportunity required for that purpose may properly be provided upon the premises of a literary institution for its students.

The relator, which was incorporated "to establish and maintain a seminary of learning in the county of Niagara for the care and education of young men," acquired title, as authorized by the acts incorporating it, to a tract of land on the east side of and adjacent to the Niagara river, in the town of Lewiston, extending back from the river about one mile, and being in width about one-half mile, containing, exclusive of a highway and of the lands of a railroad company which runs northerly and southerly through the premises, about 294 8-100 acres. The buildings are near the west end of the farm and consist of a college building, a chapel and other buildings occupied as a tailor shop for repairing the clothes of the professors and pupils, a shop for repairing their shoes, a music and band-room and some sleeping-rooms, a laundry, a wood-house and bake shop, a carpenter's shop, a machine shop, a gas-house, a boiler-room and some dwellings. The buildings are occupied and used and the business is carried on for the benefit and purposes of the institution and the

teachers and students of the college. There is also a cemetery and an apple orchard on the premises.

The land farther east is used for raising vegetables, grain, hay and for pasturage; horses being kept for the purpose of working the land and upwards of thirty cows to supply milk and butter. The teachers and students are furnished by the corporation with board, and their washing and mending is done for them, the students being charged therefor. All the products of the farm are used upon the premises to supply those engaged there as teachers, students and servants.

*Held*, that as the farm on which the college building is situated was used for the maintenance of the college and in support of its efficiency in aid of education, and seemed to be wholly devoted to the purpose of the institution, and as its extent did not seem to be unreasonably great, the whole tract of land was entitled to be exempted from taxation under the provisions of subdivision 3 of section 4 of 1 Revised Statutes, 888, as amended by chapter 397 of 1883.

*It seems*, that in entering land upon the assessment-rolls for an omitted tax of the preceding year the assessors can exercise no discretion. Their powers and duties being, in this respect, merely ministerial, they can do no more than to enter the same valuation as that of the year before. (BRADLEY, J.)

APPEAL from an order of the Erie Special Term modifying an assessment.

This is a proceeding by *certiorari* to review the assessment of 1885, made of the relator's property. The relator was incorporated "to establish and maintain a seminary of learning in the county of Niagara, for the care and education of young men," by Laws of 1863 (chap. 190). And it was by the act provided that whenever, in the opinion of the regents of the university, the state of literature of the seminary and the value of its property should justify it, they might, on the petition of the trustees, erect it into a college. (*Id.*, § 6, amended by Laws 1883, chap. 92.) And it was authorized to take title to certain property. (Laws of 1877, chap. 273.) The institution was erected into a college by the regents of the university, by an instrument to that effect of date of August 7, 1883, recorded in their book of incorporations September 27, 1883.

The relator's land is on the east side of and adjacent to the Niagara river, in the town of Lewiston, and contains, exclusive of the highway and the Rome, Watertown and Ogdensburg Railroad, running through it, 294 $\frac{1}{8}$  acres. This railroad runs northerly and southerly through the premises, and is east of the college building and chapel. In 1884 the east part, and all except forty-five acres of

the land, was assessed as 250 acres at fifty dollars per acre, \$12,500, and the tax levied was \$137.76. This assessment was in proceeding by *certiorari* stricken from the roll for informality in its entry upon it. In 1885 assessment was made of the premises, excepting designated portions, making fourteen forty-seven one-hundredths acres. And that assessed was inserted at 271 acres at fifty dollars per acre, \$13,550, and tax levied \$194.34. And the omitted tax of 1884 was made as upon 271 acres, at a valuation of \$13,550, and tax levied, \$149.33.

This proceeding was taken to review the assessment of 1885 and the entry as for the omitted tax of 1884. The Special Term struck out the entry of the assessment as for omitted tax, and modified the other by extending the exemption so as to cover twelve sixty-nine one-hundredths acres more of the premises and reduced the assessment accordingly. Both parties appeal.

*C. H. & T. H. Piper*, for the relator.

*Joel L. Walker*, for the defendants.

BRADLEY, J.:

The statute under which the exemption is claimed by the relators provides that "every building erected for the use of a college, incorporated academy, or other seminary of learning, and in actual use for either of such purposes; every building for public worship, every school-house, court-house and jail, used for either of such purposes, and the several lots whereon such buildings so used are situated, and the furniture belonging to each," shall be exempt from taxation. (1 R. S., 388, § 4, sub. 3, as amended by Laws of 1883, chap. 397.) The buildings of the relator, so far as requisite for the purpose, come within the provisions of this statute. They have been for many years and were, at the time of the assessments, used as and for a seminary of learning. The question here is whether the exemption extends to all the land there owned by and in the occupation and use of the relator, or whether less than the whole, and if so, how much, and what portion of it, properly comes within such protection.

The land constituting this farm was known as lots 27 and 28 of the "Mile Reserve," and extends back from the river about one

mile, and is in width about one-half mile. The buildings are near the west end of the farm, and consist of a college building, a chapel and other buildings occupied as tailor shop, for repairing the clothes of the professors and pupils, a shop for repairing their shoes, a music and band-room, and some sleeping-rooms; a laundry, a wood-house and bake-shop, a carpenter shop, a machine shop, a printing office, a gas-house, a boiler-room, and some dwellings. The buildings are occupied, used, and the business carried on for the benefit and purposes of the institution and the teachers and students of the college. There is also a cemetery and an apple orchard on the premises.

The land further east is used for raising vegetables, grain, hay, and for pasturage. Horses are kept for the purpose of working the land, and upwards of thirty cows to supply milk and butter. The teachers and students are furnished by the corporation with board, and washing and mending are done for them there, and the students are charged for it. All the products of the farm are used upon the premises, to supply those engaged there as teachers, students and servants, and are said to be insufficient for such purposes. The number of students was 190, from September, 1884, to June, 1885. Since then the average has been 150. The college has capacity for 225. From the printing office is issued, to subscribers, a paper edited by students, and some job work is done there. The premises, as a whole, are operated for the benefit of the institution, and the system by which they are conducted seems to be one for its maintenance. Its purpose, evidently, is self-support.

The policy of the law has been, in this State from an early day, to encourage, foster and protect corporate institutions of religious and literary character, because the religious, moral and intellectual culture afforded by them were deemed, as they are in fact, beneficial to the public, necessary to the advancement of civilization, and the promotion of the welfare of society. And, therefore, those institutions have been relieved from the burden of taxation by statutory exemption.

This statute is entitled to such a construction as will permit it to serve the purposes in view. There is, by its terms, no qualification of the purposes for which the lot on which the buildings are situated may be used, nor is the dimension of the lot prescribed;



but a reasonably necessary interpretation requires that the lot be devoted to no use other than that which is necessary or fairly incident to the use and purposes of the institution. The contemplated dimensions of the lot must, in like manner, be governed by the reasonable and proper uses to which it is applied rather than to its magnitude when within reasonable limits in that respect. Suitable recreation and physical exercise are deemed requisite to health and successful mental culture. The means and opportunity for that purpose may, therefore, properly be provided upon the premises of a literary institution for its students. This was the view of the Special Term, and its order embraced within the exemption all those portions of the land in question devoted to such purposes. The inquiry now arises whether that portion of the lot or farm which supplies the substantial maintenance of the relator, that which furnishes its vegetables, the grain for its bread, the milk, butter and pork for its table, come within the like protection. The farm upon which the college building is situated is used for the maintenance of the college, goes in support of its efficiency in aid of education and seems to be wholly devoted to the purposes of the institution and in its behalf. And, so far as adequacy may furnish a guide in that direction, it does not here appear that the extent of the premises is unreasonable for those purposes. The question presented does not seem to have often arisen under the statute. The question has in this State usually been one of concession rather than litigation.

In *People ex rel. Academy of the Sacred Heart, etc., v. Commissioner of Taxes* (6 Hun, 109), the relator was an academy, its buildings were upon premises owned by it, containing about fifty acres. The buildings covered five acres, a garden occupied eight acres of it, where vegetables were produced for the use of the teachers and pupils, and thirty-six acres were used for walks and recreation of the students. The court there held that the entire land was within the meaning of the statute exempt from assessment from taxes. And this was affirmed by the Court of Appeals. (64 N. Y., 656.)

In *People ex rel. St. John's College v. Commissioner of Taxes* (10 Hun, 246), the lots on which the college buildings were situated comprised 103 acres, the portions not occupied by the buildings were used as a vegetable garden and for farming purposes for the

pupils, teachers and officers of the college, as a cemetery, and for the recreation and walks of the pupils. It was held that the land was exempt from taxation. The rule of construction of the statute adopted in those cases appears to be applicable to the case at bar. The difference in quantity of the lands there and in this case does not seem important, inasmuch as all portions of the lot or farm in question are in use for the purposes of the college, its pupils, teachers and servants, and its products are wholly devoted to, and exhausted by, such use. The question is wholly one of statutory construction and not of discretion of the assessors, when the facts are not in dispute. When they made the assessment the assessors may not have had the means of information satisfactory to them of the operation of the land and the uses made of its products.

The premises appeared to have the management common to farming lands, and were operated for like general purposes, and in like manner divided by fences into fields for grain, meadow and pasture. The facts are not questioned by the evidence that the agricultural and horticultural business of the farm are conducted by the relator through its servants, for the single purpose of furnishing supplies for its maintenance, upon the system adopted by it to carry on its work of education. And whether or not this may be deemed the better manner to aid the result, in view of or within the legitimate purposes of the institution, is not the subject of inquiry here, but is matter of its discretion, unless it may be seen that it is an improper exercise of corporate power in aid of or to accomplish the purposes of its organization. It is not so treated. (*People ex rel. St. John's College v. Comr. of Taxes, supra*; *Wesleyan Academy v. Wilbraham*, 99 Mass., 599.)

The question presented by this case is one of some importance, in view of the quantity of land embraced in the lot, and of the fact that the products are used to some extent to supply the students with board for a consideration by them paid.

In the view taken here, this is not done as a means of profit, as distinguished from that of maintenance of the institution, but as the latter, and for its support in the accomplishment of its educational purposes. This construction of the statute seems to lead to the conclusion that the limit is measured only by adequacy, when the situation in other respects comes within the statute, and that

any other rule must be dependent upon legislation. And although this construction is not made entirely clear by the terms of the statute, the adjudications referred to seem to furnish authority for its support.

The fact that the lot is intersected by a highway, and a railroad constructed through it, does not, we think, affect its character as a lot, in its relation to the institution as such, within the meaning of the statute. The question was, to some extent, in the *St. John's College* case. While most of the buildings are west of the railroad there are some east of it, "erected for the use of seminary," within the meaning of the statute.

The amendment of 1883, given to the statute, is not a modification bearing upon any question in this case. The purpose and effect of the amendment were to designate, as the buildings within the statute, those only which are in use for the specified purposes.

These views render the consideration of the question relating to the omitted tax of 1884 unnecessary.

We think that question was properly disposed of at the Special Term. In entering the land upon the roll of 1885, as for an omitted tax of the preceding year, the assessors could exercise no discretion. Their powers and duties in that respect were ministerial. They could properly do no more than to enter the same valuation as that of the year before, and the board of supervisors were required to levy a tax at the same rate per cent as that of such year. (Laws of 1865, chap. 453; *People ex rel. Oswald v. Goff*, 52 N. Y., 434.) We think the assessors were not permitted by this statute, with a view to an omitted tax, to insert on the roll a greater valuation than that of the preceding year, although they made entry as original assessment of an increased quantity of land, but that they should have been governed by the judicial action of the assessors of such preceding year.

If the view taken of this case is correct, the conclusion follows that the judgment should be reversed, so far as it sustains the assessment of any portion of the relator's land, and so modified as to direct that the assessment of 1885 be stricken from the roll, and in other respects, and as so modified affirmed.

SMITH, P. J., and BARKER, J., concurred; HAIGHT, J., not sitting.

HUN—VOL. XI:II 5

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FIFTH DEPARTMENT, OCTOBER TERM, 1886.

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Judgment, so far as it sustains the assessment of any portion of the relator's land, reversed, and so modified as to strike the assessment of 1885 from the roll, and as so modified affirmed, without costs to either party.

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IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNTS  
OF A. MATILDA PIFFARD AND CHARLES JONES, AS  
EXECUTORS OF THE LAST WILL AND TESTAMENT OF DAVID  
PIFFARD, DECEASED.

*Will—power of a testator to provide that a bequest shall, in case of the death of the legatee before the death of the testator, go as directed in a will then or thereafter to be executed by the legatee.*

By his will, dated July 24, 1876, David Piffard directed his executors to sell all his property, real and personal, and after the payment of his debts and funeral expenses he gave and bequeathed one-fifth of the remaining proceeds to his daughter, Sarah Eyre Piffard. By a codicil dated April 24, 1878, after making changes in the executors named in the will, and confirming it in every respect not modified by the codicil, he added: "I do hereby direct that my said daughters, Sarah Eyre Piffard and Ann Matilda Piffard, named in my said will, shall have power, by their several wills heretofore or hereafter duly made and executed, to dispose of, devise and bequeath the share of my estate devised and bequeathed to them severally in and by my said will, and to that end I direct that such share or shares shall be paid over by my said executors to the executors or trustees named in and by the several wills of my said daughters, in case of the death of them, or either of them, in my lifetime, instead of to my said daughter or daughters; but if my said daughters shall survive me, then such shares shall be paid to them severally as now provided in and by my said will."

By codicils, made in 1878, 1880, 1881 and 1883, in one of which reference was made to the death of his daughter, Sarah Eyre Piffard, slight changes were made, the will being in all other respects in each case confirmed. Sarah Eyre Piffard died on August 26, 1881, leaving a will made on August 21, 1880, by which she disposed of all her property, which will was admitted to probate, and letters testamentary were issued to the persons named by her as executors on September 30, 1881.

David Piffard died in 1883, and his will was duly admitted to probate in that year,

*Held*, that the legacy, given to Sarah Eyre Piffard, did not lapse upon her death and that it should be paid by the executors of the will of David Piffard to her executors.

APPEAL from a portion of a decree of the Surrogate's Court of Livingston county.

By his will, under date of July 24, 1876, David Piffard directed his executors to sell all his property, real and personal, and after the payment of his debts and funeral expenses he gave and bequeathed one-fifth of the remaining proceeds to his daughter, Sarah Eyre Piffard. By a codicil of the date of April 24, 1878, he made some change in the executors named in his will, which he confirmed in every respect not modified by the codicil, and added: "I do hereby direct that my said daughters, Sarah Eyre Piffard and Ann Matilda Piffard, named in my said will, shall have power, by their several wills heretofore or hereafter duly made and executed, to dispose of, devise and bequeath the share of my estate devised and bequeathed to them severally in and by my said will, and to that end I direct that such share or shares shall be paid over by my said executors to the executors or trustees named in and by the several wills of my said daughters in case of the death of them, or either of them, in my lifetime, instead of to my said daughter or daughters; but if my said daughters shall survive me, then such shares shall be paid to them severally as now provided in and by my said will."

He made another codicil of the date of April 24, 1878, by which he made a further change of executors and declared his confirmation of the previous codicil.

On March 6, 1880, he, by codicil, made some additional changes of executors, and in all other respects confirmed his will and the two previous codicils. By another codicil of date September 7, 1881, he refers to the death of his daughter Sarah Eyre Piffard, who had before been named as one of the executors of his will, makes some slight changes affecting no question here, and ratified and confirms the will and codicils except as thereby expressly changed. And on June 3, 1882, he makes another codicil, in which he says: "I hereby ratify and confirm my said will and the four foregoing codicils thereto except as the same are expressly changed or modified by this codicil." He died June 27, 1883, and his will and the codicils were admitted to probate September 3, 1883, and letters testamentary issued to the executors.

Sarah Eyre Piffard made her will August 21, 1880, by which she made disposition of all her property. She died August 26, 1881,

and her will went to probate, and letters testamentary were issued to the executors by her nominated September 30, 1881.

The executors of the will of David Piffard proceeded on the assumption that the legacy to Sarah Eyre Piffard, by reason of her death before that of their testator, had lapsed, and that he died intestate as to that one-fifth of his estate bequeathed to her, and made distribution of it amongst his next of kin. And upon their accounting the executors filed an account accordingly.

This was contested. And the surrogate determined that the legacy of one-fifth to Sarah Eyre Piffard had not lapsed, but that the power of appointment was executed by her will, and that such one-fifth, amounting to \$6,005.94, should be paid by the distributees receiving it to the executors of her will. Decree was entered accordingly, from which this appeal is taken by the executors of the will of David Piffard.

*John R. Strang*, for the executors, appellants.

*George F. Yeoman*, for the executors of Sarah Eyre Piffard, respondents.

*F. H. Wilson*, for Emma Piffard, contestant and respondent.

BRADLEY, J.:

The question presented is whether the legatees of the will of Sarah Eyre Piffard are entitled to the one-fifth part of the estate of David Piffard, deceased, by virtue of the power of appointment and direction given by his will.

If their right depended upon a mere power given by his will, without any other supporting provisions, and the execution of it by her will, there might be some difficulty in supporting their claim in view of the provisions of her will, and of the fact of her decease prior to that of the donor of the power. (*Jones v. Southall*, 32 Beav., 31.) And a like difficulty would be apparent if the affirmative finding of intent, in fact, on her part to execute the power, were requisite to such result. But the provisions of the will of David Piffard go farther and make the will of his daughter operate as execution of the power, in the event only that he survive her, otherwise the fund goes to her as its sole beneficial legatee. And the rule of the common

law requiring affirmative evidence, in a will of intent to execute by it a power of appointment for its consummation, has been abrogated by the statute which provides that "lands embraced in a power to devise shall pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power, shall appear expressly or by necessary implication." (1 R. S., 737, § 126.) The rule declared by this statute is applicable to personal as well as to real property. (*Cutting v. Cutting*, 86 N. Y., 522; *Hutton v. Benkard*, 92 id., 296.)

It is, however, contended on the part of the appellants that her intent that her will should not operate as an execution of the power does appear by necessary implication, because her death was nearly two years prior to that of her father, and by her will the intent appears to dispose by it of *her* property only. It is quite true that the power expressed in his will did not become effectual as such until his death, and that at the time of her decease the fund in question was no part of her property, and her will was ineffectual to vest, at that time, any right to it in her legatees.

While no greater force could be given to her will than it then had, the operation of its provisions may have become effectual, in some future event, to afford and vest rights which were inchoate at the time of her death. If permitted to apply to personal property, the statutory term applicable to powers as such, that given by the will of David Piffard, may be treated as a general and beneficial power. (1 R. S., 732, §§ 77-79.) No person other than the donee of the power had any interest in its execution; and there is no apparent difficulty arising out of her death prior to that of the donor in the consummation of the execution of it, through the will of the former, if the provisions of the wills of both of them are such as to fairly require that result. This situation renders the consideration of the purpose of the father, as found in his will, somewhat important. He evidently intended to dispose of all his property by his will, and his purpose in that respect should be effectuated if circumstances permit. (*Vernon v. Vernon*, 53 N. Y., 351.)

The situation which he had in view, to give effect to the execution of the power, was his survival of the donee of the power, and in that event only, he directed the payment of the fund (the one-fifth of the proceeds of his estate) to the executors of her will. Such

direction is, in that event, unqualified by any provision of his will, but it may be deemed dependent upon the sufficiency of the provisions of the will of his daughter to dispose of the fund.

This right of execution of the power and disposition of the fund was not confined to a testamentary instrument made after that of the donor, by which the power was created, but he expressly gave the effect of execution of the power to the will of the donee, if it had been before then made. It would, therefore, seem that the execution of the power was not by him made dependent upon the actual intent in fact of the donee at the time of making her will, but only on the sufficiency of its provisions to carry the fund and permit her executors to dispose of or distribute it.

Miss Piffard disposed of all her property, by the terms of her will, and the words "my property," which she used in the will, cannot fairly be treated as words of limitation to property, the title to which was vested in her at the time of her decease, but embraced all property which she then or in any future event had the right to dispose of by her will pursuant to any power devolved upon her. (1 R. S., 737, § 126; *Hutton v. Benkard*, 92 N. Y., 295-301.) As the inquiry proceeds it is seen that after the death of the donee, and again eight months after her will was admitted to probate, the donor of the power, by further codicils to his will, distinctly ratified and confirmed the provisions of his will, giving the power of appointment and the direction to pay the fund to the executors of her will. He thus continues to speak not only from the time those provisions were inserted in his will, but speaks also as of the time of the execution of the codicils. (*Brown v. Clark*, 77 N. Y., 369-375.) And while they do not have the effect to add any force to the provisions of the will as before made, the confirmatory declarations in the codicils, after the death of his daughter and after the probate of her will, go in support of and seem to require the conclusion that his purpose was that the fund in question should pass by her will to the legatees named in it. Whatever views may be entertained of the intent in fact of the donee, the legal effect of the provisions of the will of David Piffard was to impress upon her will the intent on her part to execute the power and to pass the fund to her legatees. This view effectuates the apparent intent of the donor and, as we think, violates no rule of construction or of law.



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FIFTH DEPARTMENT, OCTOBER TERM, 1886.

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In *White v. Licks* (33 N. Y., 383; affirming S. C., 43 Barb., 64) much discussion would have been obviated if the rule of intent declared by the statute had then been treated as applicable to powers relating to personal as well as real property. No other questions seem to require consideration.

The decree should be affirmed.

SMITH, P. J., and BARKER, J., concurred; HAIGHT, J., not sitting.

Decree affirmed, without costs.

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JOHN CHADWICK, APPELLANT, v. DECIMUS R. BURROWS  
AND OTHERS, RESPONDENTS.

*Right of one partner to transfer firm property, in consideration of an agreement by the purchaser to pay a certain percentage upon the firm debts — when it will be sustained as against objecting creditors — a condition that the amount to be paid shall be received in full of the debt would invalidate it.*

The firm of Burrows & Lane having become insolvent, and Lane having absconded, a meeting of their creditors was held at which the property and liabilities of the firm were examined and ascertained. Upon the recommendation of all the creditors, except the plaintiff, the defendant Burrows executed an assignment of all the firm property to the defendant Potts, and in consideration thereof the said Potts agreed to pay each of the creditors of the said firm forty per cent of the indebtedness of each creditor in full for such debt, and to accept the said assignment in full of his own claim, amounting to over \$18,000. Potts subsequently paid to each creditor forty per cent of his claim according to the agreement, except that he did not pay the plaintiff for the reason that he would not receive it.

The plaintiff having recovered a judgment, and issued an execution thereon, which was returned unsatisfied, brought this action, in which he claimed that the sale was fraudulent as against the creditors of the firm.

*Held*, that the legal effect of the sale of the firm property to Potts, in view of the purpose and consideration, was not such as to charge the parties to it with the intent to hinder and delay the plaintiff in the collection of his debt, and thus render it fraudulent as against him.

That the provision of the agreement, to the effect that Potts should pay "to each of the creditors of the said firm of Burrows & Lane forty per cent of the indebtedness of each creditor *in full of such debt*," was to be construed as applicable only to those creditors who consented to adopt the same and be bound thereby, and that any creditor who did not agree to be bound thereby was

entitled to collect from Potts forty per cent of the amount of his claim, to be applied in satisfaction thereof to that extent and no further.

*It seems*, that if the right of the creditors to receive the amounts specified in the assignment had been made to depend upon the condition that they should discharge the entire debt due to them on receipt of the prescribed rate of forty per cent of their respective demands, it would have been held to be a stipulation for the advantage of the assignor which would have rendered the assignment invalid.

That as the complaint contained allegations which would have permitted the Special Term to treat the case as within the statute, providing for creditors' actions not resting upon fraudulent dispositions of property, and to grant the appropriate relief, the judgment should be so modified as to direct the payment by the defendant Potts to the plaintiff of the forty per cent, the purchase-price of the firm property, which he undertook to pay on account of the debt due to the plaintiff.

APPEAL from a judgment, entered on the decision of the Niagara Special Term, dismissing the complaint on the merits.

Decimus R. Burrows and Calvin G. Lane were partners, carrying on the lumbering business at Tonawanda, N. Y., in the firm name of Burrows & Lane. The justice before whom the action was tried found, among other things, as follows: "That the defendant Burrows and said Calvin G. Lane were engaged in a general lumber business at Tonawanda, and that shortly prior to December 18, 1873, said Lane absconded from this State. The affairs of said firm being in an embarrassed condition, a meeting of the creditors of the said firm was called; and upon the recommendation of said creditors, all of them joining therein except this plaintiff, the said defendant Decimus R. Burrows, in behalf of his firm, made and executed an assignment of all the firm property, being the same property mentioned and described in the complaint in this action, to the defendant John E. Potts, and, in consideration thereof, the defendant John E. Potts agreed to pay each of the creditors of the said firm of Burrows & Lane forty per cent of the indebtedness of each creditor in full for such debt, and that he agreed to accept said assignment in full of his own claim, amounting to over \$18,000; and that said John E. Potts did subsequently pay each of said creditors forty per cent of his claim, according to his said agreement to do so, except that he did not pay this plaintiff forty per cent of his claim, for the reason that he would not receive it, and that this assignment, so made by said Decimus R.

Burrows, on behalf of the firm of Burrows & Lane, to the defendant John E. Potts, was not made with the intent to hinder, delay or defraud the creditors of the said firm of Burrows & Lane, nor any one of them, nor was it accepted by the defendant John E. Potts with such intent or purpose."

The plaintiff proceeded to judgment on his claim, and execution thereon having been returned unsatisfied, he, by this action, charges that such sale, and the sales of other property by Burrows individually to Potts, were fraudulent as against creditors. Also, that the defendant Potts has other property, etc., in his hands belonging to the firm, etc. Lane and George W. Sherman were named as defendants. The former was not served, and both he and Sherman afterwards died, and the action proceeded against the appellants only.

*A. K. Potter*, for the appellant.

*Geo. Wing*, for the respondents.

BRADLEY, J. :

The action is in the nature of a creditor's bill to set aside the sales made by the firm of Burrows & Lane, and by Burrows to the defendant Potts, upon the charge that they were fraudulent as against the plaintiff, a creditor of the firm.

The trial court found and determined that the allegations of fraud were not supported and dismissed the complaint. The value of the property of the firm transferred to Potts is not, nor is the amount of its liabilities, found by the court. The evidence on those subjects was mainly that of the plaintiff, and, in view of his relation to the action, it did not conclusively establish the facts to which he testified. The court was not requested to find on those propositions of fact; and, inasmuch as no finding was made in those respects, no question of the comparative amount in value of the property and of the liabilities of the firm is presented on this review to the prejudice of the result given by the decision of the trial court.

The inquiry, therefore, arises whether the legal effect of the sale of the firm property to Potts, in view of the purpose and consideration, was such as to charge the parties to it with the intent to

hinder and delay the plaintiff in the collection of his debt, and thus render it fraudulent as against him. The one member of the firm had the right to sell the partnership property and apply the avails on the debts of the firm. (*Mabbett v. White*, 12 N. Y., 442; *Graser v. Stellwagen*, 25 id., 315.) The sale to Potts was absolute in terms. There was no reservation in the property or proceeds to inure to the benefit of the debtor firms in any event, other than that derived from the payment by Potts upon its debts, in performance of the consideration of the sale to him, unless an advantage may be found to have been reserved in the fact, as found by the court, that Potts "agreed to pay each of the creditors of the said firm of Burrows & Lane forty per cent of the indebtedness of each creditor *in full* of such debt." If an assignment had been made to him, in trust for the creditors, and it had required them to satisfy their claims as a condition of receiving respectively stated sums, less than the full amount of their debts, the instrument would have been fraudulent and void, as against any creditors who had not consented to such a disposition of property. (*Hyslop v. Clarke*, 14 Johns., 458; *Grover v. Wakeman*, 11 Wend., 187; *Armstrong v. Byrne*, 1 Edw. Ch., 79; *Spaulding v. Strang*, 37 N. Y., 139.) The validity of an assignment, in trust for the benefit of creditors, requires that the assignor part with all control over the property assigned, and that it be unqualifiedly devoted to the payment of his debts, without any reservation for his own advantage. This is the condition on which he is permitted to withdraw it from the ordinary process of the law. Although the sale here was in terms absolute, it was made under an arrangement that the vendee should apply the purchase-price upon the debts of the vendors, and if such application was by the agreement, without the consent of the creditors, made to depend upon the condition that the creditors should discharge the entire debts due them on receipt of the prescribed rate of forty per cent of their respective amounts, it would seem to be a stipulation for the advantage of the vendor in the agreement of sale, which might not legally be sanctioned. The debtor firm was at liberty to sell its property for an adequate consideration, and direct the payment of the purchase-money on a portion only of the debts, and in that manner give a preference to creditors. The consideration to be paid for the property here was the amount of the par-

ticular percentage of *all* the debts to be paid by the purchaser to the creditors. So far the agreement was valid. And so far as the agreement to pay that amount in full satisfaction of the debts applied to those creditors who had consented to such arrangement, it was also valid.

In view of the circumstances a fair construction of the agreement makes it in that respect applicable only to those creditors who, by their consent, adopted it. It certainly would not affect or apply to any others. This arrangement was brought about at a meeting of nearly all of the creditors, and made pursuant to their request. They were willing to take forty per cent in satisfaction of their claims. It was in view of the arrangement by and with them that the sale and purchase were made. And Burrows was probably induced to make the transfer by reason of the understanding thus made with such creditors, so far as they could do it, that the firm property should go in satisfaction of the partnership liabilities. The title passed to Potts, and he assumed the obligation to pay for it by paying to *all* the creditors *pro rata*, a sum equal to such percentage of their debts against the firm. This would seem to give to the plaintiff the right to the stipulated rate to apply on his claim without any undertaking on his part to discharge the residue of his demand.

The expectation (if it existed) of Burrows that the discharge of all the debts could be produced by such payments, and the arrangement in that respect in the agreement of sale, could not affect the liability of Potts to make the payments which he undertook to make.

The evidence tends to prove that the creditors or some of them, who received such amount, assigned their claims to Potts. This evidently was done to carry out such arrangement to discharge the debts. The defendant Potts was not a trustee, and the payments required of him were not made in the execution of a power, but in the performance of an original obligation to pay his own debt created by his purchase. This liability of Potts was property within the reach of the several creditors to the extent of their rights, respectively, to appropriate it to the payment of their claims, and is distinguished from a power arising out of a trust, in its legal effect as against the creditors of the vendor, if free from fraud in fact. The finding of the trial court that the sale and purchase of the firm property, and the conveyance by Burrows to Potts of the

Canada property, and his interest in the house and lot at Tonawanda, were without any intent to hinder, delay or defraud the creditors of the firm, seems to be supported. The view thus taken here leads to the conclusion that the disposition made of the case in that respect at Special Term was not error. But the rights of the plaintiff may properly be settled by the judgment in this action, and they should be, in view of the difficulty which may otherwise arise elsewhere, so as to declare his right to the *pro rata* sum of the proceeds of the sale of the firm property, by way of the abatement to that extent of the amount of his claim. The matter of the construction, before mentioned as to him, of the agreement and purchase and for the payment to the creditors, may not be so clear as to obviate discussion, but his right as a creditor to that portion of the purchase-money (as it remains unpaid), whether pursuant to the agreement to pay him forty per cent, or as a fund arising out of liability to pay for firm property purchased, seems clear.

The complaint contains allegations which would have permitted the Special Term to treat the case as within the statute providing for creditors' actions not resting in fraudulent disposition of property as well as the common law creditors' action founded upon the latter, and the court may have given such relief. (Code Civil Pro., § 1871.) This has taken the place of 2 Revised Statutes (173, § 38), and it is very likely that this relief would have been given if the attention of the court had been specifically called to it, which the record does not show was in any manner done.

The judgment should be so modified as to direct the payment by the defendant Potts to the plaintiff of the portion of the purchase-price of the firm property which he undertook to pay on account of the debt due to the plaintiff, that is to say, forty per cent of such debt, to be applied in abatement thereof to the extent only of such payment, and as so modified affirmed, without costs to any party.

SMITH, P. J., BARKER and HAIGHT, JJ., concurred.

Judgment modified so as to direct the payment by the defendant Potts to the plaintiff of the portion of the purchase-price of the firm property which he undertook to pay on account of the debt due the plaintiff, that is, forty per cent of such debt, to be applied in abatement of such debt to the extent of such payment only, and

FIFTH DEPARTMENT, OCTOBER TERM, 1886.

further modified by striking out the award of costs to the defendant, and as so modified affirmed, without costs of this appeal to either party.

THOMAS MOORE, RESPONDENT, v. HENRY A. TAYLOR  
AND JOSEPH C. TONE, APPELLANTS.

SAME, RESPONDENT, v. SAME, APPELLANTS.

*Contract for the construction of a railroad — right of the person, contracting with the company, to pay claims for services filed by laborers against a second sub-contractor, and apply the same in payment of the amount due to a first sub-contractor to whom such person has sub-let the contract — when he does not lose this right by taking an assignment of the claims filed — right to recover, as damages for a breach of a contract, profits which would have been received if the contract had been completed — such damages are not recoverable where the breach complained of is simply a failure to pay an installment of money due by the terms of the contract.*

This action was brought by the plaintiff, a sub-contractor, to recover for work done and materials furnished prior to July 25, 1882, under an agreement with the defendants, who were contractors for the construction of the Ontario Belt Railway, by which the plaintiff agreed to construct certain portions of the road-bed of the railroad company, at prices specified in the contract, and which were payable in cash, bonds and stock of the company in the proportion and at the times therein provided. The referee, before whom the action was tried, found that for the work done and materials furnished by the plaintiff under the agreement, prior to July 25, 1882, he was entitled to recover the sum of \$12,854, for which sum and interest thereon he directed a judgment.

The referee also found that the plaintiff sub-let the work of construction to Moore & Sullivan, who entered upon the performance of the work; that in the latter part of July the laborers on the work became clamorous for their pay and insubordinate, refusing to work longer unless paid, and that they did quit on or before July twenty-ninth; that Moore & Sullivan, with the plaintiff's assent, on that day requested the defendants to pay the men or to furnish the money for that purpose, and proposed to give them security that the money should be paid to the laborers in case they furnished it; that after the defendants had refused to do this, the plaintiff made a demand on the defendants that payment be made to him.

That on that day, and during several following days, the defendants procured a large number of the laborers to make and file their claims for unpaid services against the railroad company, amounting in all to about \$6,940.10, under chapter 669 of 1871, and after the notices of such claims were handed to the person on whom the service was intended to be made, the claims were assigned to the defendants by the laborers, and the defendants paid to them respectively

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the amounts of their claims; that none of these claims have been enforced, and no attempt has been made to collect them by action against the company, but that the defendants still hold them as assignees; that these claims are or purport to be against Moore & Sullivan, and not the plaintiff.

*Held*, that as it was admitted that the defendants entered into a contract with the company for the construction of the road, the property of the company could be charged on default of the contractors, or sub-contractors, to pay the laborers.

That as the company would be entitled to compel the defendants to reimburse it for any amount which it might be compelled to pay on account of such claims, the defendants had such an interest in seeing that such claims were paid by their immediate, or any subsequent, sub contractors, as required the payment so made by them to be treated as made for the plaintiff, and authorized the defendants to apply the amount thereof upon their indebtedness to him.

That, in view of all the circumstances of the case, the taking of the assignments of the claims by the defendants could not be treated as an obstacle to the application of the amount of them in reduction of the recovery for the work done, on account of which the money was advanced.

In a second action tried before the same referee, brought to recover for work done after July twenty-fifth, and damages for a breach of the contract on the part of the defendants, the referee found that after August 1, 1882, the plaintiff demanded of the defendant the payment of the money and bonds due him on the contract, and that they refused to pay the same, or any part thereof, except the sum of \$6,000, which they offered to pay to the plaintiff on his agreeing that it should be paid, under their direction, to the laborers; that the apportioned payments provided for in the contract were intended by the parties to put the plaintiff in funds to pay his laborers and the expenses of doing said work and, therefore, became a very essential part of the contract; that on or about August twelfth the plaintiff abandoned the construction of the railroad, for the reason that the defendants refused to perform their part of said contract, in refusing to pay the said cash and bonds due on August first for work done up to July twenty-fifth, thus depriving him of the means to pay off his laborers and induce them to continue the work; that the plaintiff was entitled to recover whatever damages he had sustained by reason of the defendants' breach of the contract in the particulars stated.

The referee allowed as damages the remainder obtained by deducting from the sum of the amount to be paid in cash the par value of the bonds and stock to be delivered and ten per cent of these amounts added thereto, the amount of the payments made and the estimated cost of completing the work.

*Held*, that a claim made by the defendants that a right reserved by the contract—to the effect that in the event they should for any reason fail to continue the work and should notify the plaintiff to suspend or cease operations, a measurement should be made of and payment be made for the work done at specified rates—operated to defeat the right of the plaintiff to recover damages, or to claim anything otherwise than what was provided for as compensation by the



contract, could not be sustained, as the facts proved did not bring the case within this provision of the contract.

That it was error to allow the plaintiff to recover, as damages: the prospective profits which the completion of the performance of his contract would have given him.

The right to such relief does not arise out of every breach of a contract for the performance of services, but is dependent upon that which operates as a denial of the right to proceed and complete the work contracted for.

Mere default in payment of an installment, when it becomes due, is not a denial of the right of the contractor to continue in the performance of the services; and although it will permit him to abandon the work and recover for what has already been done under it, it will not enable him to recover the damages which the law would give in case of a refusal to let him proceed in the performance of the contract.

APPEALS from judgments, entered upon the reports of a referee.

On June 7, 1882, the defendants, being contractors with the Ontario Belt Railway for the construction of its road, entered into an agreement with the plaintiff by which the plaintiff agreed to do the work of graduation, bridging, masonry, track-laying, track-surfacing and distribution of ties, on the Rochester and Ontario Belt Railway, commencing at station (O), on the bluff of the Genesee river; thence on pleasure line to about station 67, at junction with the permanent line at station 380; thence along it to about station 616, at the shore of Lake Ontario; and in addition three sidings, aggregating about 2,600 feet of track, switches and frogs, and a branch of about 4,000 feet; the surfacing and track-laying in all about seven miles; the clearing and grubbing estimated about five acres; earth assumed to amount to 81,000 yards; rock, 1,000 yards; bridging, 30,000 feet, board measure; masonry, 200 cubic yards. The prices: earth, per cubic yard, twenty-five cents cash, five cents in bonds and five cents in stock; rock, per cubic yard, one dollar and twenty cents cash, five cents in bonds and five cents in stock; trestle bridging, per 1,000 feet, board measure, fifty dollars in cash, two dollars in bonds and two dollars in stock; dry masonry, per cubic yard, two dollars and fifty cents cash, fifty cents in bonds and fifty cents in stock; track-laying, per mile, \$250 cash, ten dollars in bonds and ten dollars in stock; track and sidings surfacing, \$400 cash, twenty dollars in bonds and twenty dollars in stock; switches and frogs laid, each couple, \$100 cash, five dollars in bonds and five dollars in stock; clearing and

grubbing, per acre, forty dollars cash, three dollars in bonds and three dollars in stock. (The bonds and stock to be taken at seventy-five per cent of their par value.) Any extra work outside the agreement to be paid for monthly, in cash, with ten per cent added for superintendence, use of men and tools. But, notwithstanding these estimates and rates, the "bulk-price" to be paid to the plaintiff for the work is \$28,500 cash, \$4,500 in bonds and \$4,500 in stock, at seventy-five per cent of their par value, equaling \$6,000 of each, at par value. Payments to be made on account of the work as often as every two weeks, and payment of cash and bonds on or before August 1, 1882, for the total work done up to July twenty-fifth, and final payment in cash, bonds and stock, found to be due, within five days after the completion of the work. In the event that the defendants should fail to continue the work, and should notify the plaintiff to suspend operations, it was provided that the latter should be paid certain specified rates for the work done up to that time, and in addition, as liquidated damages, \$1,000, if he shall not then have excavated as much as 20,000 yards of material, and \$500 if he shall then have excavated more than 20,000 yards. And if it shall be determined to construct only the railroad from the junction at station three hundred and eighty from main line, and to abandon the pleasure line construction, from station O to station sixty-seven, the total payments shall be reduced by four thousand dollars cash, one thousand dollars bonds, at par, and one thousand dollars stock, at par, making the total payment under the contract aggregate twenty-four thousand five hundred dollars cash, five thousand dollars bonds, at par, and five thousand dollars stock, at par.

The plaintiff entered upon the performance of the contract and continued the work until about the 1st day of August, 1882, when he substantially ceased and shortly thereafter abandoned the work uncompleted.

The action number one was commenced August 4, 1882, to recover for work done up to July 25, 1882, and the plaintiff recovered \$12,854 and interest, making together \$14,897.78.

Action number two was brought August 17, 1882, and the recovery was \$15,988.37, and interest \$2,512.73, making \$18,501.10. This was made up of some work found to have been done after July twenty-fifth, and damages for breach, on the part of the

defendant, of the contract; the larger part of the amount of the recovery was for such damages.

The referee found that up to July 25, 1882, the work done and materials furnished under the contract were:

43,000 yards earth excavation, 142 yards rock excavation, one-tenth mile track laid, eight acres cleared and grubbed, thirty yards dry masonry, 25,300 feet timber, extra work.....	\$2,727 27
And ten per cent added.....	272 73
Making altogether, at the contract prices.....	\$17,854 00
And deducting payment made July 10, 1882.....	5,000 00
Leaves balance of.....	\$12,854 00
Which, with interest from August 5, 1882.....	2,043 78
Makes .....	<u>\$14,897 78</u>

For which he directed judgment in action number one. That the whole amount of work done and material furnished by the plaintiff under the contract were 46,754 yards of earth excavation, one-twentieth mile of track surfacing, and extra work \$3,947.60, and in other respects the amount of work was not increased any after the twenty-fifth of July, thus producing, subsequent to that date,  $46,704 - 43,000 = 3,704$  yards earth excavation; one-twentieth mile of surfacing, and extra work  $\$3,947.60 - \$2,727.27 = \$1,220.33$ , to which add ten per cent, \$122.03.

The referee also found that after the 1st day of August, 1882, the plaintiff demanded of the defendants the payment of the money and bonds due him on the contract and they "refused to pay the same, or any part thereof, except the sum of six thousand dollars, which the defendants offered to pay to plaintiff on condition that plaintiff would sign a receipt therefor embodying a condition that said six thousand dollars should be paid out under the direction of the defendants to the laborers for work they had done on said road as shown by said pay-roll, which plaintiff refused to sign and defendants refused to pay." That the apportional payments provided for in the contract "were intended by the parties to put the plaintiff in funds to pay his laborers and expenses of doing

said work, and, therefore, became a very essential part of the contract." That on or about the 12th day of August, 1882, the plaintiff abandoned the construction of the railroad and the further work necessary to complete it, "for the reason that the defendants refused to perform their part of said contract in refusing to pay the said cash and bonds due on the 1st day of August, 1882, for work done up to July 25, 1882, \* \* \* thus depriving him of the means to pay off his laborers and procure their continuance at work." And as matter of law the referee determined that the refusal of the defendants to make such payment was a violation and breach of the contract, "which absolved the plaintiff from further continuing" the work under the contract, and that the plaintiff has the "right to recover whatever damages he has sustained by reason of defendants' breach of said contract in the particular stated."

The referee found that the expense of completing the work, as the plaintiff left it, was \$8,000, and proceeds to make the statement that the full price to be paid is :

Cash .....	\$28,500 00
In bonds, \$4,500; in stock, \$4,500.....	9,000 00
Extra work, with ten per cent added.....	4,842 37
<b>Making.....</b>	<b>\$41,842 37</b>
And deducting amount recovered in action	
number one.....	\$12,854 00
The payment made July 10, 1882.....	5,000 00
The cost of completion of the work.....	8,000 00
	<u>25,854 00</u>
<b>Leaving a balance of.....</b>	<b>\$15,988 37</b>

And concluded that the plaintiff is entitled to recover in action number two that sum, with interest added, making \$18,501.10. The defendants excepted to the several conclusions of fact and law of the referee and appealed.

*McNaughton & Olmsted* and *Frank R. Lawrence*, for the appellants.

*J. & Q. Van Voorhis*, for the respondent.

BRADLEY, J. :

There was some controversy on the trial in respect to the quantity of work performed under the contract. The accuracy of the estimates presented by the evidence of the respective parties was the subject of fair criticism. Those furnished on the part of the plaintiff were made without measurements, and those on the part of the defendants were estimates aided by partial measurements only. Thus was presented an apparent conflict in the evidence. No actual measurements or estimates were made by the defendants or their engineers, or those of the railway company prior to August first, of the work done up to July twenty-fifth, and there is some evidence tending to prove that then and thereafter there were difficulties in the way of making accurate measurements or estimates of the work done, occasioned by various causes, for which the plaintiff was not responsible, and that the measurements made on the part of the defendants and estimates founded upon them were not necessarily accurate; that the plaintiff himself and another engaged in the work were civil engineers, and that they made estimates with knowledge and observation of the work as it progressed. The estimates so made by them were sufficient in extent to cover the amount of work found by the referee. The evidence, as a whole, in this respect presented a question of fact, and we cannot say, in the light in which he was permitted to view the evidence as it was adduced, that his finding is so against the weight of evidence as to justify the disturbance of his finding. We think his conclusion, as to the quantity of work done, was permitted by the evidence.

There is not a very clearly defined division of the work into that done before and that done after the 25th July, 1882, but there is some evidence on the subject, which enabled the referee to make the severance and to support his conclusion in that respect.

The defendants allege the abandonment by the plaintiff of the work which he undertook to perform under the contract, and that a large number of persons gave notice to the railway company of their claims for labor done, and filed liens against the company for materials furnished and used in the work of construction under the contract in question; that the defendants paid such claims, amounting to \$6,940.10, and took assignments. They sought to charge

the amounts so paid against the plaintiff as counter-claims. The referee did not allow to the defendants the sums so paid, but found that the plaintiff sub-let the work of construction, except the trestle bridge and the pile bridge work, to Moore & Sullivan, who entered upon the performance of the work; that in the latter part of July the laborers on the work became clamorous for their pay and insubordinate, refusing to work longer unless paid, and that they did quit on or before July twenty-ninth; that Moore & Sullivan, with plaintiff's assent, on that day requested the defendants to pay the men, or to furnish the money for that purpose, and proposed to give the defendants security that the money should be paid to the laborers in case they furnished it, which the defendants refused to do, after which the plaintiff made the demand that payment be made to him; that on July twenty-ninth, and during several following days, the defendants procured a large number of the laborers to make and file their claims for unpaid services against the railroad company, amounting in all to about \$6,940.10, under chapter 669 of Laws of 1871, and after the notices of such claims were handed to the person on whom the service was intended, the claims were assigned to the defendants by the laborers, and the defendants paid to them, respectively, the amounts of their claims; that none of these claims have been enforced, and no attempt has been made to collect them by action against the company, but that the defendants still hold them, as assignees; that these claims are, or purport to be, against Moore & Sullivan, and not the plaintiff. And the referee determined that these alleged counter-claims were not demands against the plaintiff; that as against the railroad company they ceased to be enforceable before the answer in this action was served; that the defendants hold them, as assignees, simply against Moore & Sullivan, and that the condition on which the defendants offered to pay the \$6,000 to the plaintiff was one they had no right to require.

There was no specific contract between the railroad company and the defendants produced or proved upon the trial, but it appeared incidentally, in various ways, that they were contractors with the company for the construction of the road, and it was evidently assumed upon the trial that they had such relation to it. Their privity by contract was with the plaintiff only; and assuming that

the latter had by contract sub-let a portion of the work to Moore & Sullivan, they were accountable directly to the plaintiff only for the performance of their contract, and they were primarily liable for the labor and materials obtained by and furnished to them by their request. But the work being done pursuant to a contract originally made with the railroad company, it and its property could be charged on default of the contractors, or sub-contractors, to pay the laborers, etc. (Laws of 1850, chap. 140, § 12, as amended by Laws of 1871, chap. 669, § 2; Laws 1875, chap. 392; Laws 1870, chap. 529.) And in the event the company should be required to pay such claims, it might require reimbursement from the party with whom it had contracted to do the work out of which they arose. As a consequence the party taking such contract would have an interest in seeing to it that such claims were paid by his immediate or any subsequent sub-contractor. And the obligation is implied, if not expressed, that such succeeding contractor will protect the party from whom he takes such relation by contract to perform the work, or any part of it, embraced in the original contract with the company, against such claims and liabilities by him incurred. The defendants seem to have been apprehensive that the money might not be applied in payment of the claims of the character before mentioned and, therefore, required assurance that it should be so appropriated. The plaintiff was unwilling to give a receipt for the money containing such a condition, and the \$6,000 which the defendants were then ready to pay was withheld from the plaintiff and defendants proceeded to pay the laborers. In aid of this Moore & Sullivan furnished to the defendants' agent the pay-roll, and Sullivan advised such agent that he had sent word to their time-keeper to meet him at a place named so that payment could be made to the men, and such was the place where the men were paid; and the referee has found that Moore & Sullivan, with plaintiff's assent, requested the defendants to pay the men or to furnish the money for such purpose. By making such payment, with the assent of the plaintiff and Moore & Sullivan, the liability to them to that extent of the plaintiff would be discharged and the payment would be deemed made by the defendants for the plaintiff; and in that view there might be no difficulty in charging the latter with the amount if the defendants had not taken assignments of the claims

for which they advanced the money to pay. By reason of taking such assignments it is contended that Moore & Sullivan remain liable to the defendants upon the claims, and, therefore, they cannot be asserted in this action against the plaintiff, treating the primary liability as that of Moore & Sullivan, only, to the men; that is so, unless the peculiar situation and relation of the parties and the right of the claimants to charge the company, and that of the latter to seek reimbursement from the defendants, may be considered and given effect to afford the relief sought by them here.

The proceeding attending the act of payment, of having notices served upon the engineer of the company under the statute, and taking assignments, was evidently taken as a matter of precaution, so that the payments might be deemed as made to discharge the company and its property from a liability to pay, and thus protect themselves from liability to it. And while the apparent effect of the assignments was to vest in the defendants the title to the claims as against the parties primarily and personally liable to pay them, the purpose evidently was to take such title only as a means of making more effectual their purpose to apply the moneys, so advanced, upon the amount of compensation which they, by their contract, had agreed to pay the plaintiff for the work of construction of the railroad, and not with any view to create a liability of any other party to them for the amount so paid. They in this may have done, and probably did do, more than was necessary to put themselves in a position to charge the plaintiff with the payment so made, although the question of voluntary payment otherwise might have been raised. (*Senear v. Woods*, 74 N. Y., 615.) The question presented here is not without some difficulty, but we think these payments should, and may, be allowed to the defendants in this action number one. Proceedings were taken to charge the company, and it is not important what the inducement was to cause it, if it was legally done. This afforded to the defendants the right to step in and protect themselves by relieving the company. If they had not done this the right of the company would arise to pay and seek relief from the defendants and they, in turn, to charge the plaintiff, and if Moore & Sullivan, as his subcontractors, were first liable to pay, he could require allowance by, or reimbursement from, them to him. This circuitry of action could result



in no advantage to any party, and would, in practical effect, finally accomplish the application of the amount involved, upon and in payment to that extent of the contracted compensation for the work. By charging this against the plaintiff he is relieved from so much of his liability to Moore & Sullivan, for their work. The taking the assignment, if an excessive act, was deemed a precautionary one to protect the defendants in making the payments, and, in view of the circumstances, cannot well be treated as an obstacle to the application of the amount of them in reduction of the recovery for the work done on account of which the money was advanced. The fact (if so) that because no action was commenced against the company to recover the claims, the right to do so was barred before the defendants answered in this action, is not important. The payment was made to relieve the company when the right to charge it existed, and after the preliminary steps had been taken which might result in that effect. The defendants had no right to maintain any action against the company on account of such claims. As between it and them, the primary liability was with the defendants, and as to the company, the workmen were deemed paid by this act of the defendants, in any view that could be taken of the assignments.

This action is brought upon the contract between the plaintiff and defendants to recover for this work, and as between them it was deemed done by the plaintiff in performance of such contract. It was on account of this work that such payments were made, and they were made with the consent of Moore & Sullivan, who were in some manner acting through or under the plaintiff in the performance of the contract between the latter and the defendants. We think the amount of these payments so made by the defendants properly should and can be allowed to the defendants by way of abatement of the plaintiff's recovery.

The evidence about fares, etc., of the men, said to have been paid by Moore & Sullivan, is somewhat indefinite. Nothing appeared on the pay-rolls in that respect. They say they informed the defendants' agent that deduction should be made on that account from the moneys earned by the laborers, which he denies. Moore & Sullivan, knowing that the defendants were proceeding to pay the men, and consenting to it, gave no information to enable them to

make such deduction or to attempt to do it. And it does not appear that any arrangement had been made with the men by which they had become chargeable with any amount paid for their fares, etc. And Charles K. Moore adds to the effect that they intended to deduct out of the last payment; that if they did it before then it would have created some disturbance, and that he did not know that this was to be the last pay-roll. There is no finding on this subject, and in view of the evidence we are unable to determine that the defendants were required to make the deduction at the time of payment, or that they paid the men more than they were required to pay to discharge their claims for the work they had done. The correctness in the amount of the claims so paid is not questioned.

It is contended on the part of the defendants that the plaintiff, without cause, abandoned the work before full performance of his contract, and that such fact should go in defense of action number one, as the provision of the contract for intermediate payments must be deemed conditional and dependent upon its complete performance. It is true that the agreement to pay in installments from time to time as the work progressed, rates of prices for it founded upon estimates was so far conditional that the payments should not exceed in amount the bulk price to be paid for the entire work, yet, inside of that, the plaintiff had the right to recover the installments provided for on performance, to the time and extent required by the contract, to enable him to demand payment of them, subject only to the right of the defendants to allege and establish, by way of abatement, such damages as they may have sustained by any subsequent breach of the contract on his part, which is the extent of the defense that could be made, founded upon such alleged abandonment. (*Sickels v. Pattison*, 14 Wend., 257; *Snook v. Fries*, 19 Barb., 313; *Tipton v. Feitner*, 20 N. Y., 423.) No facts are found, and none necessarily established by the evidence, which require the consideration in action number one, of the question of the alleged abandonment by the plaintiff or any further question in that action.

But in action number two such abandonment, its cause and effect, have some importance. The referee finds, and it is assumed here, that the defendants refused to pay to the plaintiff, on the 1st day of

August, 1882, the sum he was then entitled to demand and receive for work done up to July twenty-fifth, and that on or about the twelfth day of August the plaintiff abandoned the work for the reason that the defendants refused to pay the amount due on the first of that month.

The important question arising upon this state of facts is whether the plaintiff, in consequence of this breach of the contract, was entitled to recover, by way of damages, prospective profits or such profits as would result to him from a complete performance of the contract. The referee found that by this refusal to pay the plaintiff he was deprived of "the means to pay off his laborers, and procure their continuance at work." And, as conclusion of law, adds that such refusal was a violation and breach of the contract on the part of the defendants, which absolved the plaintiff from further performance; that he had the right to abandon the work and recover whatever damages he had sustained by reason of such breach, and then proceeds to award him as such damages the difference between the contract-price and the estimated cost of the unperformed work of the contract. This was the correct rule for the measurement of damages if the plaintiff was, by the defendants, prevented from proceeding to complete performance, unless there was something in the contract to defeat the application of that rule. (*Masterton v. The Mayor*, 7 Hill., 61.) It is contended by the defendants' counsel that the right reserved to the defendants by the provision of the contract, to the effect that in the event they should, for any reason, fail to continue the work, and should notify the plaintiff to suspend or cease operations, a measurement should be made of, and payment made for, the work done at specified rates, operated to defeat the right of the plaintiff to recover damages, or to claim anything otherwise than is provided for as compensation by the contract. That provision evidently had reference to a suspension or discontinuance of the work by the defendants for some cause which might arise. They had no purpose to discontinue the work of construction. They urged the plaintiff to proceed, and, on his refusal to do so, they caused the work by other means to go on to completion.

The situation did not come within the provision last referred to of the contract. (*Danolds v. The State*, 89 N. Y., 36, 43.)

The provision that in case it should be determined "to abandon the pleasure line construction, from station O to station sixty-seven, \* \* \* the total payments shall be reduced by four thousand dollars cash, one thousand dollars bonds, at par, and one thousand dollars stock, at par, making the total payments under the contract aggregate twenty-four thousand five hundred dollars cash, five thousand dollars bonds, at par, and five thousand dollars stock, at par," was made effectual by abandonment of construction of that branch of the line of road, as appears by the uncontradicted evidence of the plaintiff, which should, as against him, be treated as controlling the disposition of that question. If this fact had been observed and adopted by the referee, his estimation of the damages would have been \$5,500 less than the amount by him awarded to the plaintiff. It appears that the case contains all the evidence which, in this court, presents the question of fact upon the evidence, although no request was made to find, and no finding made by the referee in that respect.

The more serious inquiry remains and is, whether, in any view which may be taken of the evidence, the plaintiff was permitted to recover, as damages, the prospective profits which the completion of performance by him of his contract would have given him? The right to such relief does not arise out of every breach of a contract for the performance of services, but is dependent upon that which operates as a denial of the right to proceed to completion of the work contracted for. Mere default in payment of an installment, when it becomes due, is not a denial of the right of the contractor to continue in the performance of the service, and although it may be a breach which would permit him to abandon the work, and recover for that already done, it would not enable him to recover the damages which the law would give for refusal to let him proceed in performance of the contract.

There was no obstruction put in the way of such performance, other than the effect of the refusal to pay the installment due the first of August. The referee has found that the provision for payment, as the work progressed, "was a very essential condition, bearing directly upon the performance of the contract by the plaintiff," and that Moore & Sullivan were "unable to go on with the same, in consequence solely of defendants' refusal to pay the moneys

due, according to their contract." There being nothing in the contract declaring the effect of failure to make any such payment, the question is one of the legal consequence of such default. Our attention is called to no case, yet, holding that a breach of a stipulation to pay can be treated, in legal effect, as a denial of the right to proceed, in the performance of a contract, to perform service to completion by the other party, or as creating liability for a right to recover prospective profits, by way of damages, as a consequence. The failure to pay gives an immediate remedy, by action, to recover the stipulated amount, and this is not inconsistent with the right to continue to go forward with the work. The cause which permits the recovery of such damages rests upon a rule of law, having some degree of certainty, and is founded in the fact that the one party is prevented by the act of the other from realizing the benefit which the contract furnishes, and he is, therefore, entitled to recover the value of the stipulation, or covenant he has taken, of him who defeats such right. Such value is the amount of profits to result from performance.

An agreement to make payment is generally an essential one, and the consequences of default in payment may, in fact, be more or less prejudicial, according to circumstances, but in legal contemplation they are the same. The pecuniary condition and responsibility of the parties have no bearing upon this question. The rights at law flowing from or produced by a breach of contract arise at once from it and will support an action. If default in payment alone would afford a remedy as for exclusion from further performance, the right of action and of recovery of the entire value of the contract would immediately follow failure to pay, although it arose from mere temporary want of readiness to make payment. In this case the legal right of the plaintiff to proceed in the performance of the contract was not affected by the default of the defendants. But it is said that the defendants sought to and did embarrass the plaintiff by inciting the laborers to insist upon payment fortnightly, when otherwise they would have been content to take their pay monthly. There is no finding on that subject in this action number two to that effect, and in view of the evidence there is no occasion here for considering that question as bearing upon the proposition now under consideration. The men became insubordinate and

quit work because they did not receive their pay as promptly as they desired, and this was probably occasioned by the default of the defendants, and may be attributable to a breach by them, in that respect, of the contract and as one of its consequences, as it is likely that the plaintiff was not, nor were Moore & Sullivan, prepared to pay them without receiving the funds from the defendants. But the latter early offered to furnish the money for that purpose upon the condition that it should be used to pay the men. We do not regard this as important upon the question here in its legal aspect. The view taken of this case leads to the conclusion that the plaintiff was justified, by the breach on the part of the defendants, in abandoning the further performance of the contract, and entitled to recover for the work done. But the breach not being such as to deny to him the right and power to go forward with the work and perform, he could not recover, as damages, the value of his contract or (what may be understood to mean the same thing) prospective profits. There is nothing in the terms of the contract characterizing the consequence of default in payment of an installment other than such as may be implied by law. In view of the finding by the referee of the quantity of work done under the contract,

It amounted to..... \$22,761 43

The recovery in action number one, \$12,854, and payment, \$5,000 ..... 17, 854 00

The balance unpaid is..... \$4,907 43

This result is reached by giving to the plaintiff the benefit of the payments provided by the contract to be made on the final estimate of the work when completed, in stock, for which the breach of the contract, as found by the referee, permits the allowance to the extent of the work performed. (*Pinney v. Gleason*, 5 Wend., 393.) This computation makes the amount awarded by the referee, as damages, \$11,080.94.

If these views are correct the judgment in action number one should be reversed and new trial granted, costs to abide the event, unless the plaintiff stipulate to deduct from the amount of the recovery \$6,940.10, and interest thereon from August 5, 1882; and in that event the judgment be so modified, and as modified affirmed, without costs of this appeal to either party. And in action number

FIFTH DEPARTMENT, OCTOBER TERM, 1886.

two the judgment should be reversed and a new trial granted, costs to abide the event, unless the plaintiff stipulate to deduct from the amount of the recovery \$11,080.94, and interest thereon from August 17, 1882; and in that case the judgment be so modified, and as modified affirmed, without costs of this appeal to either party.

SMITH, P. J., BARKER and HAIGHT, JJ., concurred.

So ordered.

WILLIAM T. EATON, A. D. WHEELER AND OTHERS, APPELLANTS, v. WALTER A. WILCOX AND OTHERS, RESPONDENTS.

42h 61  
54nd804

*Lease of lands to be used for the purpose of boring for oil or gas — construction of covenants contained in it — when a covenant will be held void for uncertainty.*

On May 19, 1881, the defendant Foster leased to the plaintiffs fifteen acres of land, with "the right to take, bore and mine for and gather all oil or gases found in and upon the premises, to have and to hold the same for the term of twelve years from this date, or as long as oil is found in paying quantities," the plaintiffs agreeing to give Foster one-eighth part of the oil produced and saved from the premises. By the lease the party of the second part (the plaintiffs) covenanted "to commence operations for said mining purposes, and prosecute the same on some portion of the above-described premises within two years from this date, or thereafter pay to the party of the first part (Foster) dollars per unit work is commenced. This lease shall be null and void, and at an end unless said second party shall, within six months from this date, commence and prosecute, with due diligence, unavoidable accidents excepted, the sinking and boring of one well on or in the vicinity of this lease, to a depth of twelve hundred feet, unless oil in paying quantities is sooner found. \* \* \* If the party of the second part fails to keep and perform the covenants and agreements by him to be kept and performed, then this lease shall be null and void, and surrendered to the party of the first part."

Within six months from the date of the lease the plaintiffs drilled a well of the required depth, natural gas being found at the depth of 1,045 feet in large quantities, and some oil, but not in paying quantities, at 1,093 feet. The plaintiff used the gas for fuel in drilling the well, but not in any other manner. In the fall of 1882 the plaintiffs removed their engines, etc., leaving the casing in the well, and ceased to carry on mining operations.

In February, 1884, Foster leased the premises to the defendant, Charles P. Thurston, who subsequently assigned such lease to the defendant, The Alleghany Gas Company (Limited), for the same purposes, pursuant to which they entered into possession of the same and collected and sold the gas.

In this action, brought by the plaintiffs to restrain the defendants from interfering with, or appropriating to their own use, the gas well and the gas therein, the

referee held that the suspension of work upon the premises and the neglect of the plaintiffs to prosecute the same from the spring of 1882, to the time of their demand, gave Foster the right to declare the plaintiffs' rights under the lease forfeited, and that the complaint should have been dismissed.

*Held*, that he erred in so doing.

That there was no covenant in the lease which required the plaintiffs to continue the boring of oil wells upon the premises until oil was obtained in paying quantities, under a penalty of forfeiting their rights by a failure so to do.

That the covenant requiring them to commence and prosecute operations for mining purposes within two years from the date of the lease, or thereafter pay to the party of the first part        dollars per        until work is commenced, was void for uncertainty, by reason of the blanks which were left in the vital and essential parts thereof.

That the decision could not be sustained because the referee was of the impression that the lease was hard and unconscionable and that equity would not enforce the performance of it for the reason that it contained no provision for giving the lessor any part of the gas found upon the premises.

That if a clause, providing that the lessor should have one-eighth part of the gas, had been omitted by mistake, the contract might still be reformed so as to express the intention of the parties; that if it now expressed their intention the parties must abide by it.

The defendants claimed that the lease had expired by its own terms, as the provision that the lessees should "have and hold the same for the term of twelve years from this date, or as long as oil is found in paying quantities," limited the term to that period, during which oil was found in paying quantities.

*Held*, that this claim was not well founded; that the term fixed was for twelve years, and as much longer as oil was found in paying quantities.

APPEAL from a judgment in favor of the defendants, entered in Allegany county upon the report of a referee.

*Hamilton Ward* and *Rufus Scott*, for the appellants.

*Cary & Rumsey*, for the respondents.

HAIGHT, J.:

This action was brought to restrain the defendants from interfering with, and appropriating to their own use, a gas well and the gas therein, belonging to the plaintiffs. The referee has found, as facts, that on the 19th day of May, 1881, the defendant Harvey C. Foster leased to the plaintiffs fifteen acres of land situated in the town of Wirt, Allegany county, "the right to take, bore and mine for, and gather all oil or gases found in and upon the premises, to have and to hold the same for the term of twelve years from this



date, or as long as oil is found in paying quantities." In consideration whereof the plaintiffs agreed to give Foster one-eighth part of the oil produced and saved from the premises. The lease contained the following covenants: "The party of the second part covenants to commence operations for said mining purposes, and prosecute the same on some portion of the above-described premises, within two years from this date, or thereafter pay to the party of the first part                      dollars per                      until work is commenced. This lease shall be null and void and at an end unless said second party shall, within six months from this date, commence and prosecute, with due diligence, unavoidable accidents excepted, the sinking and boring of one well on or in the vicinity of this lease, to a depth of twelve hundred feet, unless oil in paying quantities is sooner found. \* \* \* If the party of the second part fails to keep and perform the covenants and agreements by him to be kept and performed, then this lease shall be null and void and surrendered to the party of the first part." That the defendant Harvey C. Foster was the owner in fee of the premises; that the lessees did, within six months from the date of the lease, commence and prosecute, with due diligence, unavoidable accidents excepted, the sinking and boring of one well on the lease to a depth of over 1,200 feet; that for that purpose they entered upon the premises, erected thereon a derrick and engine-house, and with their engine, boiler, tools and machinery placed therein by them, commenced drilling the forepart of the month of June, 1881, and first drilled to the depth of 1,093 feet, and after shutting down for about two weeks during the month of July, started up again and drilled to the depth of 1,500 feet, which depth was reached about the middle of the month of August, 1881; that drilling was then suspended and afterwards resumed, and in the winter and early spring of 1882, the well was put down 300 feet deeper, making the total depth of the well 1,800 feet, at an expense to the plaintiffs of about \$3,000; that at the depth of 1,045 feet natural gas was found in large quantities, and at 1,093 feet some oil was found, not, however, in paying quantities; that the well was cased down to the rock, a depth of 285 feet, but was never tubed for the purpose of obtaining oil; that the plaintiffs used the gas for fuel in drilling the last 300 feet, but did not utilize the gas in any other

manner, the same being thereafter allowed to burn and go to waste; that the plaintiffs did not, after the spring of 1882, further prosecute operations for mining purposes on the premises or thereafter attempt to obtain oil on the premises; that in the fall of 1882 the plaintiffs removed their engines, boiler and machinery from the premises, leaving thereon their derrick and engine-house, the casing in the well and 150 feet of tubing which conducted the gas away from the well; that in the fall of 1883, two or three joints of tubing, of the length of about nineteen feet each, were taken to the well by the direction of one of the plaintiffs, but nothing was done with them there.

The referee further found, as facts, that on or about the 8th day of February, 1884, the defendant Foster, by an instrument in writing, let unto the defendant Charles P. Thurstone the premises described in the complaint, for the sole purpose of mining, drilling and excavating for petroleum, rock or carbon oil, or gas, or other valuable minerals, containing the following provision: "It is further agreed that this instrument is subject to a lease of a part of said land made to Wilcox, Wheeler & Eaton, in case the same has not now or does not become forfeited or canceled, and if the well on said lease is used by the said party of the second part, he is to pay the party of the first part rent for the same as if he had drilled it originally." This lease was subsequently assigned to the defendant, the Allegany Gas Company (Limited), who subsequently entered into possession of the premises, took possession of this well and have ever since appropriated the gas therefrom, conducting it in pipes to the works of the company; that the well and gas have been and are of great value; that after the Allegany Gas Company entered into possession of the premises, the plaintiffs, on the 14th day of February, 1884, demanded of the company the right to enter the premises for the purpose of receiving their share of the gas taken from the well; that they were excluded from the well and from any share in the gas by the defendant, the Allegany Gas Company (Limited).

The referee further found, as conclusions of law, that the suspension of work upon the premises by the plaintiffs, and their neglect to prosecute the same from the spring of 1882 to the time of their demand, gave to the defendant Harvey C. Foster and his

assigns the right to declare the plaintiffs' rights under the lease forfeited; that the demise by Foster to Thurstone, and the possession so taken under his lease, operated as an election by Foster and his assigns to declare the plaintiffs' lease forfeited for such failure, and the defendants were entitled to have the complaint dismissed, with costs.

The question thus presented depends upon the construction which should be given to the covenants contained in the plaintiffs' lease. Have the plaintiffs failed to keep and perform the covenants and agreements by them to be kept and performed so as to have forfeited the lease? The referee has, as we have seen, found, as a fact, that the covenant to commence and prosecute, with due diligence, unavoidable accidents excepted, the sinking and boring of one well on or in the vicinity of this lease to a depth of 1,200 feet, unless oil in paying quantities is sooner found, within six months from the date of the lease, has been fully performed by the plaintiffs. But he takes the position in his opinion that the instrument, as a whole, is simply an oil lease, and that the phrase "prosecute the same," appearing in the first covenant quoted, required the plaintiffs to continue the boring of oil wells upon the premises until oil was obtained in paying quantities, and that by failing to do this they forfeited their rights under the lease. The difficulty with the learned referee's conclusion is, that the lease is for "all oil or gases found," and that no such covenant appears in the lease. Had the lease contained such a covenant we should not hesitate to agree with him that there was a forfeiture. The covenant is not that they shall commence operations within two years and prosecute the same with diligence until oil in paying quantities is found or forfeit their rights under the lease, but it is that they shall commence operations and prosecute the same within two years from the date of the lease, or thereafter pay to the party of the first part        dollars per        until work is commenced (quite a different covenant), and the referee has failed to point out any particular in which this covenant has been violated. But, again, it will be observed that in this covenant blanks appear, constituting a patent ambiguity which cannot even be supplied by parol evidence. The blanks appear in the vital and essential part of the covenant. They affect the entire covenant, and it consequently is void for uncer-

tainty. (2 Pars. on Cont., 557-563; *The Blossburg and Corning Railroad Co. v. The Tioga Railroad Co.*, 1 Keyes, 486; *Vandevoort v. Dewey* (42 Hun, 68.)

The cases relied upon by the respondents are clearly distinguishable.

In the case of *The Allegany Oil Company (Limited) v. The Bradford Oil Company* (21 Hun, 26), the lease provided that unless the lessee should commence to bore the well within the period of nine months from the date thereof, that then the lease was to become void and cease to be of any binding effect. The lessee did not commence operations at all within the period agreed upon. The lease was, therefore, forfeited by its express provisions.

In the case of *Brown v. Vandergrift* (80 Pa. State, 142), the lease provided that the lessee should commence operations in sixty days and continue with due diligence, and if he should cease operations twenty days at any one time, the lessor might resume possession; and that in case the lessee did not commence operations within the time specified he should pay thirty dollars per month until he should commence. He did not commence operations within the time, and paid four months rent, but omitted to pay for the next eleven months. After the premises had been again leased, and the lessee thereunder had entered into the possession thereof, the first lessee tendered the eleven months rent past due. It was held that the lease was forfeited.

In the case of *Munroe v. Armstrong* (96 Pa. State, 307), the lease was made exclusively for the purpose of producing oil. It provided that the work of boring for oil was to be commenced in ten days and continue with due diligence until success or abandonment, and if the lessee failed to get oil in paying quantities, or ceased work for thirty days at any time, the lease was to be forfeited and be void. It was held that a cessation of work for thirty days forfeited the lease in accordance with its express provisions.

The particulars in which the contracts in these cases differ from the one under consideration will readily be observed, for it contained no such forfeiture clause as appears in those cases. The referee also appeared to be of the impression that this lease was hard and unconscionable, and that equity would not enforce the performance of it, for the reason that it contained no provision for giving the lessor any part of the gas found upon the premises; that

the plaintiffs might proceed and cover the premises with gas wells, and the lessor could obtain no benefit therefrom. The courts, however, are not called upon to make contracts for parties. If it was the understanding of the parties that the lessor should have one-eighth of the gas, as well as of the oil found, and that clause was omitted from the contract through mistake, it may still be reformed so as to express the intention of the parties. If, however, it was the intention of the parties that the lessor should have one-eighth of the oil only, and that the lessee should have all of the gas found, in consideration for their testing the territory for oil, then we see no reason why the parties should not abide by the contract as made. True, the lessor would derive no income from the gas that was found on the premises, but he would have no right to deprive the plaintiffs of their right to the same.

If the theory of the referee is correct, it would be the duty of the plaintiffs to continue to bore wells upon these premises, until oil was found in paying quantities, and then if not found in paying quantities, and they ceased to bore further wells, even though a well had been bored upon each acre of the land, still they would forfeit their rights under the lease, even though every well was a valuable gas well. The plaintiffs, as the referee has found, have already expended \$3,000 in boring the first well. It is quite possible that this sum is largely in excess of the value of the entire fifteen acres, for farming purposes. It is quite as hard and unconscionable to now deprive them of the right to use this valuable gas, found by them, and thus lose the money expended in the operation, as it would be to require the lessor to live up to the contract made by him.

Again, suppose oil had been discovered, but not in paying quantities? Wells that would produce five or six barrels of oil per day, but not in sufficient quantities to pay the expenses of putting down the wells and gathering the same, could it be held that the plaintiffs forfeited their rights under the lease, because it was not found in paying quantities? It appears to us that the contract should not be so construed. The plaintiffs, having performed the covenants on their part, would have the right to retain possession, for the purpose of gathering the oil which they had discovered, to reimburse themselves as far as possible.

The respondents contend that the lease has expired by its own terms; that the provision providing that "the lessees to have and to hold the same for the term of twelve years, from this date, or as long as oil is found in paying quantities," fixed the term only for that period during which oil was found in paying quantities. If so, it must have expired before the plaintiffs commenced operations, for no oil was found in paying quantities after the date of the lease and before the well was bored. Such could not have been the meaning or intention of the parties. The term was for twelve years, or as long as oil is found in paying quantities, meaning twelve years and as much longer as oil is found in paying quantities.

The judgment should be reversed and a new trial ordered before another referee, with costs to abide the event.

SMITH, P. J., BARKER and BRADLEY, JJ., concurred.

Judgment reversed, and a new trial ordered before another referee, costs to abide event.

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GILBERT M. VANDEVOORT, PLAINTIFF, v. MARY D. S. DEWEY, DEFENDANT.

*Evidence — parol evidence is inadmissible to explain a patent ambiguity — when a condition will be held invalid for uncertainty because of unfilled blanks therein.*

On February 29, 1876, Jedediah Dewey and the defendant Mary, his wife, conveyed a lot owned by the husband to their son, Albert, who, on the same day, executed a lease, which was duly recorded in the proper county clerk's office, by which, in consideration of the said conveyance, he demised and leased to the said Jedediah and Mary, "during the natural lives of them, and the survivors of them, the house and garden spot" where they then resided, being part of the premises conveyed to the son, reserving to the son "the use and occupation of the south cellar under said house; and also reserving to said party of the first part the right to terminate this lease at any time after the decease of said Jedediah Dewey, at any time when the said party of the first part has an opportunity of selling the premises, of which said house and lot or garden spot are a part, by paying to said Mary D. S. Dewey the sum of            dollars; and also reserving to Maria E. Dewey, the sister of said party of the first part, the full and free right and privilege of a home in said house in as full and perfect manner as she now enjoys the same in said house with her father, the said Jedediah Dewey, so long as she remains unmarried."

The plaintiff, who claimed title to the premises under the foreclosure of a mortgage given on October 12, 1882, by the son, Albert, brought this action to recover the possession of the house and lot against the defendant, who, after the death of her husband, continued, and still continues, to occupy the premises.

Upon the trial the plaintiff offered to prove that at the time the lease in question was executed the clause therein relating to the payment of any money was inserted by the draughtsman without the knowledge or direction of either party to the lease; that it was so inserted for the purpose of providing for a nominal consideration only; that at the time of its execution the defendant expressly disclaimed any right under that provision to any money compensation for the surrender of her lease, and that she had, at divers times since, disclaimed any rights under that provision of the lease.

*Held*, that the evidence was properly excluded.

That the failure to insert in the blank the amount that was to be paid to the defendant to terminate the lease was a patent and not a latent ambiguity, and could not be corrected by parol evidence.

That as the clause pertaining to the termination of the lease failed to express the condition upon which the right so to do depended, and was void for uncertainty, the demise to the defendant contained in the lease stood without any condition for terminating it until it should expire by her death.

MOTION by the plaintiff for a new trial on exceptions ordered at the Ontario Circuit, to be heard at the General Term, in the first instance;

*W. H. Adams*, for the plaintiff.

*Smith & Hamlin*, for the defendant.

HAIGHT, J. :

This action was ejectment to recover the possession of a house and lot. On the 29th day of February, 1876, one Jedediah Dewey, the husband of the defendant, was the owner of the lot in question, and on that day himself and wife executed and delivered to their son, Albert L. Dewey, a deed thereof, who, on the same day, executed and delivered to them a lease of which the following is a copy so far as is material to be here considered: "A lease made and entered into this 29th day of February, 1876, between Albert Dewey, of the town of Manchester, in the county of Ontario and State of New York, of the first part, and Jedediah Dewey and Mary D. S. Dewey, of the same place, of the second part. Witnesseth: That in consideration of a conveyance of real estate

and personal property this day made, and covenants and agreements herein contained, the said party of the first part has demised and leased, and does hereby demise and lease, to the said party of the second part during the natural lives of them, and the survivors of them, the following described premises, to wit: The house and garden spot where the said parties now reside, consisting of about one-fourth of an acre of land, and are a part of the premises this day deeded by said parties of the second part to said party of the first part, reserving, however, to the said party of the first part, the use and occupation of the south cellar under said house; and also reserving to said party of the first part the right to terminate this lease at any time after the decease of said Jedediah Dewey, at any time when the said party of the first part has an opportunity of selling the premises, of which said house and lot or garden spot are a part, by paying to said Mary D. S. Dewey the sum of        dollars; and also reserving to Maria E. Dewey, the sister of said party of the first part, the full and free right and privilege of a home in said house in as full and perfect manner as she now enjoys the same in said house with her father, the said Jedediah Dewey, so long as she remains unmarried."

This lease was duly recorded in the office of the clerk of Ontario county on the 29th day of March, 1876. Subsequently and on the 12th day of October, 1882, Albert L. Dewey executed and delivered a mortgage upon the premises to one J. Addison Howland. The plaintiff derived title through a foreclosure of this mortgage. Jedediah Dewey is now deceased and his widow, the defendant, still continues to occupy the premises in question.

Upon the trial the plaintiff offered to prove that at the time the lease in question was executed the clause therein relating to the payment of any money was inserted by the draughtsman without the knowledge or direction of either party to the lease; that it was so inserted for the purpose of providing for a nominal consideration only; that at the time of its execution the defendant expressly disclaimed any right under that provision to any money compensation for the surrender of the lease, and that she has, at divers times since, disclaimed any rights under that provision of the lease. This offer was objected to by the defendant and denied by the court, the plaintiff taking an exception.



The defect in the lease is in the omission to insert in the blank the amount that was to be paid to the defendant to terminate the lease at the decease of Jedediah Dewey. This defect is a patent and not a latent ambiguity, and consequently cannot be corrected by parol evidence. (2 Pars. on Cont., 557, 563; *The Blossburg and Corning Railroad Co. v. The Tioga Railroad Co.*, 1 Keyes, 486.)

If the question was one of construction, as to the meaning of the contract, the language being such as to be capable of two or more constructions, parol evidence might be competent, but in the contract under consideration there is nothing in the provisions of the contract that gives us the least intimation as to the number of dollars that it was intended to insert in the contract, and it is, consequently, not a question of construction, but an omission which can only be supplied by the court making for the parties a contract which the parties have failed to make for themselves. This the courts have no power to do. It consequently follows that the offer to give parol evidence by the plaintiff's counsel was properly excluded by the trial court, and that this clause of the lease is void for uncertainty; but it does not follow that the entire lease is void. The demise was to the defendant during her lifetime. The consideration was the deed in which she had joined with her husband to her son, the lessor. This part of the lease is separate and independent, and clearly expresses the intention of the parties. The defective clause pertains to the condition upon which the lease may be terminated. This clause fails to express the condition and is void for uncertainty. The lease, therefore, stands without any condition terminating it until it, by its terms, expires from the death of the defendant.

The lease was to Jedediah Dewey and the defendant. It was to furnish them a residence during life. It is possible that they had no right to sub-let to others. The provision in the lease, giving to Maria E. Dewey, the defendant's daughter, the right and privilege of a home in the house, in the same manner as she enjoyed it with her father prior to the making of the lease, was possibly inserted for the purpose of preventing any question in reference to the defendant's right to permit her daughter to occupy the premises; but the fact that the daughter has now ceased to live with her

mother does not in any manner curtail or limit the estate of the mother in the premises.

The motion for new trial should, therefore, be denied, and judgment ordered for the derendant upon the nonsuit.

BARKER and BRADLEY, JJ., concurred.

Motion for new trial denied, and judgment ordered for the defendant upon the nonsuit.

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BERNARD ROTHSCHILD AND OTHERS, RESPONDENTS, v.  
JACOB W. MACK, ASSIGNEE, ETC., APPELLANT.

*Set-off — when allowed in equity as against an assignee, where the debt sought to be set-off was not due at the time of the making of a general assignment by the insolvent debtor.*

On September 10, 1884, the plaintiffs indorsed and discounted, at a bank in Rochester, a note for \$5,000, made by the firm of Buchman Brothers & Co., to the order of, and indorsed by, the firm of Rindskopf Brothers & Co., of the city of New York, and remitted the proceeds thereof to the said firm of Rindskopf Brothers, being induced to so act by the representation made to them by the latter firm that the note was as good as the Bank of England, and that the plaintiffs would run no risk in indorsing it. Upon the maturity of the note, on December 23, 1884, the plaintiffs were compelled to pay the note.

At the time the note was given, the firm of Buchman Brothers & Co. was, and ever since has been, insolvent, and on September 20, 1884, it made a general assignment. The firm of Rindskopf Brothers & Co. was, at the time of the delivery of the note, and ever since has been, insolvent, and on December 19, 1884, made a general assignment to the defendant.

In this action, brought by the plaintiffs to have the amount so paid by them set off, and applied in extinguishment of an indebtedness of the plaintiffs to the firm of Rindskopf Brothers & Co., which became due and payable about January 1, 1885, a judgment was rendered in their favor.

*Held*, that it should be affirmed.

*Littlefield v. The Albany County Bank* (97 N. Y., 581) followed; *Martin v. Kunsmüller* (37 id., 896) and *Myers v. Davis* (23 id., 489) distinguished; and *Chance v. Isaacs* (5 Paige, 592-594) doubted and not followed.

APPEAL from a judgment in favor of the plaintiffs, entered upon a decision made at the Monroe Special Term.

*David Hayes*, for the respondents.

*Stern & Myers*, for the appellant.

HAIGHT, J. :

This action was brought to have a demand in favor of the plaintiffs set-off and applied in extinguishment of a claim against the plaintiffs held by the defendant.

The facts, as found by the trial court, were substantially as follows: The plaintiffs were indebted to the firm of Rindskopf Brothers & Co., of the city of New York, in the sum of \$2,796.77, which became due and payable about January 1, 1885. On or about the 6th day of September, 1884, the firm of Rindskopf Brothers & Co. indorsed and delivered to the plaintiffs a promissory note, executed by Buchman Brothers & Co., of Cincinnati, Ohio, for the sum of \$5,000, and requested the plaintiffs to raise for them, at the Traders' National Bank of Rochester, the amount of the note and give them the proceeds, at the same time representing to the plaintiffs that the note "was as good as the Bank of England; that the plaintiffs should indorse it, and that there was no risk in their doing so." That the plaintiffs thereupon, and on the 10th day of September, 1884, indorsed the note and delivered the same to the Traders' National Bank of Rochester, and obtained the amount of the note, less the usual discount, and thereupon forwarded the proceeds thereof to the firm of Rindskopf Brothers & Co., who received and used the same; that the note became due on the 22d of December, 1884, and was, on that day, presented for payment at the place where it was made payable, and payment thereof demanded, which was refused, and thereupon the same was duly protested and notice of non-payment was given to the plaintiffs and to Rindskopf Brothers & Co. Thereupon the note was paid by the plaintiffs, and no part thereof has ever been repaid to them; that the firm of Buchman Brothers & Co. were, at the time of making the note and ever since has been, insolvent, and, on the 20th day of September, 1884, made a general assignment; that the firm of Rindskopf Brothers & Co. were, at the time of the delivery of the note to the plaintiffs, and ever thereafter, insolvent, and, on the 19th day of December, 1884, made a general assignment to the defend-

ant for the benefit of creditors; that the plaintiffs indorsed the note and procured and delivered to Rindskopf Brothers & Co. the proceeds of the discount, relying upon the statement made to them, to the effect that "the note was as good as the Bank of England, and that there was no risk in their indorsing it;" and also on their liability or indebtedness to Rindskopf Brothers & Co. which was thereafter to mature and become due and payable.

It is contended, on the part of the appellant, that at the time of the assignment, the plaintiffs had no present claim due and payable by the assignors, and that, consequently, they had no right to set-off; that a court of equity can only decree a set-off in the case of mutual credits due at the time of making the assignment.

The fact is undisputed that at the time of the making of the assignment the note was held by the Traders' National Bank of Rochester, indorsed by the plaintiffs.

In the case of *Martin v. Kunzmüller* (37 N. Y., 396), it was held that an allowance to a party, by way of set-off, is always founded on existing demands, *in presenti*, and not on one that may be claimed *in futuro*; that in an action by an assignee, the defendant cannot offset a note made by the assignor which fell due after the assignment of the subject of action was made. And in the case of *Myers v. Davis* (22 N. Y., 489), it was held that until a demand becomes matured, a set-off may be defeated by the assignment of the claim, although the assignor be insolvent. But these cases were actions at law, and the set-off was attempted under the statute. In the case of *Chance v. Isaacs* (5 Paige, 592-594), it was held that the set-off could not be decreed, for the reason that the plaintiff was not the owner of the note at the time of the assignment, although he was liable upon it as an indorser. The chancellor, in delivering the opinion, says: "It is now well settled that a person who receives a negotiable promissory note from the payee, out of the usual course of business, or in security for an antecedent debt, and not for a present consideration, such as the payment of money, the delivery of goods, or the relinquishment of an existing security, takes it subject to all equities which exist against it in the hands of the former holder; and this principle applies with peculiar force to the voluntary assignee of an insolvent debtor who receives negotiable paper from the assignor under a general assignment for

the benefit of creditors. In the present case, therefore, if the complainant had been the holder and owner of the note of Isaacs, at the time this assignment was made, I should have no hesitation in declaring that Smyth took the assignment of the complainant's notes subject to the equitable right of the latter to have the note given to himself set off against them, although this note was not due at the time of the assignment. \* \* \* And as this note did not belong to the complainant at the time of the assignment, although he was contingently liable for the payment thereof, I am satisfied the vice-chancellor was right in supposing that no equitable right of set-off then existed which attached to the complainant's notes in the hands of the assignee." It is upon this case that the appellant chiefly relies, and if it is to be followed it must defeat the plaintiff's recovery. But we are inclined to doubt the soundness of the rule as applied to the facts of the case under consideration. The court, as we have seen, has found that not only the makers, but the firm of Rindskopf Brothers & Co., were, at the time of the delivery of the note to the plaintiffs, and ever thereafter, insolvent; that the plaintiffs borrowed the money at the Traders' National Bank upon the note so indorsed by them, so that the only contingency remaining to make their liability fixed was the presenting of the note at its maturity, demanding payment and the serving of notice of non-payment. This contingency did not depend upon any act of the makers, the defendants, or the defendants' assignors. A court of equity has the power to permit an equitable set-off, in cases not within the statute, if from the nature of the claim, or the situation of the parties, justice cannot be obtained by a cross action, and that, even though the debt of the complainant to the defendant is not due, if the defendant is insolvent. (*Lindsay v. Jackson*, 2 Paige, 581; *Gay v. Gay*, 10 id., 369; *Smith v. Fox*, 48 N.Y., 674; *Davidson v. Alfaro*, 80 id., 660-662; *Shipman v. Lansing*, 25 Hun, 290.)

In the case of *Smith v. Felton* (43 N. Y., 419), it was held that the amount of a partnership deposit with an insolvent banker was a proper subject of set-off, in an action brought by the assignee, in trust for creditors of such bank, on a note held by the banker, made by one of the partners and indorsed by the other for partnership purposes, although such note was not due at the time of the assignment.

In the case of *Littlefield v. The Albany County Bank* (97 N. Y., 581), the action was for a set-off in equity. The plaintiff and defendant, Jagger, were partners in business, as manufacturers, and one Perry prosecuted them for infringing letters-paten and obtained a judgment against them for \$50,000. The case was pending on appeal when the plaintiff bought of Jagger his interest in the firm, and gave promissory notes therefor. It was agreed that the purchase should not affect Jagger's liability in the Perry suit, but that the plaintiff should attend to its defense, and that Jagger would pay one-half of the expenses and of the recovery, if the judgment was sustained. At the maturity of the notes, Jagger sued the plaintiff on the notes, and while the action was pending he assigned to the Albany County Bank all moneys which he might recover thereon. He recovered judgment, and subsequently the plaintiff settled the Perry suit, paying the sum of \$50,000. He then brought action against the bank and Jagger, to have the amount so paid by him in settlement of the Perry suit, which belonged to Jagger to pay, to be offset upon the judgment which had been recovered against him upon the notes. It was held that he was entitled to the offset.

It appears to us that this case is decisive of the question under consideration. At the time of the assignment by Jagger to the Albany County Bank the plaintiff had not paid the Perry judgment. The case was still pending upon appeal, and his liability to pay depended upon the affirmance thereof. He was not, in fact, liable to pay Jagger's portion of the judgment, only as such liability grew out of the fact that he was a member of the firm, and could, therefore, be compelled to pay the whole.

No other question is presented which requires discussion. The judgment should be affirmed, with costs.

SMITH, P. J., BARKER and BRADLEY, JJ., concurred.

Judgment affirmed, with costs.

HENRY WRIGHT, APPELLANT, v. CHARLES BOLLER AND  
NICHOLAS C. RECKTENWALT, RESPONDENTS.42 77  
76 184

*Evidence of a custom, as to the manner in which other persons conduct their business, is not admissible in favor of a defendant sued for negligently conducting his business.*

In February, 1884, the plaintiff, who was walking on the west side of Louisiana street, in the city of Buffalo, turned, when opposite to the north side of Mackinaw street, to cross to the other side of Louisiana street. When he had nearly reached the curb-stone, on the easterly side of Louisiana street, he was hit by a board which had been blown from a lumber pile which was owned by the defendants, who were engaged in the lumber business, their yards being on the west side of Louisiana street.

Upon the trial of this action, brought to recover damages for the personal injuries sustained by the plaintiff, evidence was given tending to show that the lumber piles in the defendants' yard, when originally completed, were bound or tied down by boards crossing the top and hooked by means of clasps lower down upon the pile so that the boards upon the top of the pile could not blow away; that the pile from which the board in question came, had some days before been broken into and a portion thereof had been drawn away, and that the pile had been left without again being tied or fastened.

The defendants called a number of lumbermen doing business in the city of Buffalo, and were allowed, against the objection and exception of the plaintiff, to prove by them that it was the common custom, in lumber yards in that city, where a pile was once opened and was being used, not to again fasten the lumber down. The court charged that the jury had the right to take into consideration the evidence given by these witnesses, to help them to satisfy their minds and form their judgments as to what was, in that business, care and prudence.

*Held*, that the court erred in admitting the evidence and in so charging.

That the question of negligence was one for the jury, under the circumstances of the case, and did not depend upon the custom of persons engaged in a like business.

A rule of law cannot be changed by any local custom.

APPEAL from a judgment, entered upon a verdict rendered at the Erie Circuit in favor of the defendants, and from an order of the Erie Special Term denying a motion for new trial made upon a case and exceptions.

*Duckwitz & Lawler*, for the appellant.

*George Wadsworth*, for the respondents.

HAIGHT, J. :

This action was brought to recover damages for personal injuries. The defendants were engaged in the lumber business, having a yard on the north side of the Ohio basin and on the west side of Louisiana street, in the city of Buffalo, where their lumber was piled and stored. On the west side of Louisiana street, and within a few feet of the street, were three piles of lumber, two of which belonged to the defendants and the other to one Perry. On the 21st day of February, 1884, the plaintiff, in company with one Baxter, was walking on the west side of Louisiana street towards Mackinaw street; that when they got to a point opposite the north side of Mackinaw street they crossed over towards the other side, and when the plaintiff nearly reached the curb-stone, on the easterly side of Louisiana street, he was hit by a board which had blown from one of the lumber piles and received the injuries for which this action was brought.

There was evidence tending to show that these lumber piles when originally completed, were bound or tied down by boards crossing the top and hooked by means of clasps lower down upon the pile so that the boards upon the top of the pile could not blow away; that one of the defendants' piles from which the board in question came, had some days before, been broken into and a portion thereof drawn away, and that the pile had been left without again being retied or fastened. The leaving of the pile so that the boards were liable to be blown off upon travelers upon the street, is the negligence which the plaintiff charges against the defendants as the basis of his right to recover.

Upon the trial the defendants called a number of lumbermen doing business in the city of Buffalo and proved by them that it was the common custom, in lumber yards in this city, where a pile is once opened and is being used, not to again fasten the lumber down. This evidence was taken under the objection and exception of the plaintiff. The court, in its charge to the jury, instructed it that the defendants were required to do their business in the ordinary way in which men of common prudence conduct their business, and that the defendants had called a number of lumber dealers in the city who had testified that the way in which business was done in this city was that when they were drawing from a pile,



from time to time, they do not put on stays to protect the lumber; that the jury had the right to take into consideration the evidence given by these lumbermen, sworn to as to custom, to help them to satisfy their minds and form their judgments as to what is, in the business, care and prudence. The charge of the court in this particular was excepted to by the plaintiff. The question is thus presented whether the defendants can excuse their negligence by proving a custom.

The respondents contend that the case of *Barnum v. The Merchants' Fire Insurance Company* (97 N. Y., 188) is an authority sustaining the competency of the evidence and the correctness of the charge. In that case the action was upon an insurance policy upon the plaintiff's stock of goods described in the policy as "fancy goods and Yankee notions." Upon the trial the plaintiff was allowed to prove that fireworks constituted an ordinary, usual and recognized portion of a stock of fancy goods and Yankee notions in stores, and upon the review this was held proper. It will be observed that the evidence was confined to what was embraced in and meant by a stock of "fancy goods and Yankee notions," and went no further. In the case at bar the question is not what was meant by the term negligence, but is as to the custom of lumber dealers in reference to fastening the boards upon the top of their lumber piles. The custom may or may not be a proper one. There may be a custom to fire loaded guns and pistols on Independence Day, and yet an individual would hardly be excused from negligently shooting another because of such custom. A railroad company may cause injury to others by running its trains at a high rate of speed through a crowded city, and yet it would hardly be permitted to establish its right to do so by showing a custom on the part of other railroads to so run or operate their trains. The lumbermen of Buffalo may have a custom not to bind the lumber on piles that have been once broken into; their lumber yards and piles may be situated remote from the public highway where no danger can result from any neglect to so bind or tie the lumber. The circumstances under which their custom has been established may be quite different from those surrounding the defendants. Their piles are located by the side of the public way frequented with travelers, and, in our judgment, the question of negligence was one for the

jury under the circumstances of the case, and that it did not depend upon the custom of persons engaged in a like business.

The right of the plaintiff to recover depends upon a rule of law, that is, whether the defendants were guilty of negligence that contributed to or caused the injury in question, and whether the plaintiff was free from negligence contributing thereto. The rule is that a rule of law cannot be changed by any local custom. (*The Corn Exchange Bank v. The Nassau Bank*, 91 N. Y., 74; *Higgins v. Moore*, 34 id., 417; *Wheeler v. Newbould*, 16 id., 392; *Case v. Perew*, 34 Hun, 130; *West v. Kiersted*, 15 W. D., 549; *Babcock v. N. Y. C. and H. R. R. R. Co.*, 20 id., 477; *Eastham v. Riedell*, 125 Mass., 585.)

We are of the opinion that the judgment and order should be reversed and a new trial granted, with costs to abide the event.

SMITH, P. J., BARKER and BRADLEY, JJ., concurred.

Judgment and order reversed and new trial ordered, costs to abide event.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-  
ENT, v. ALEXANDER DUMAR, APPELLANT.

*Criminal pleadings—what must be alleged in an indictment in order to justify a conviction of grand larceny, for obtaining goods under false pretenses, under section 528 of the Penal Code.*

The defendant was convicted of the crime of grand larceny upon an indictment which charged that the defendant on February 8, 1885, at the city of Rochester, in the county of Monroe, a quantity of carpets, rugs and hassocks, particularly describing them, of the value of \$671, of the goods, chattels and personal property of Ilus F. Carter, then and there being found, unlawfully and feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

Upon the trial the district attorney was allowed to introduce evidence tending to show that the defendant purchased the goods of Carter, giving therefor his promissory notes indorsed by one Hensler, Carter being induced to sell the goods by an affidavit made by Hensler showing that he then owned two farms worth \$5,000, subject to a mortgage on one of \$900, and that the total of his other liabilities did not exceed \$65; that this affidavit was false,

and was known by the defendant to be so at the time that he presented the same to Carter in order to induce him to sell the goods upon credit.

*Held*, that an objection made by the defendant's counsel, to the admission of the evidence tending to show false representations, was properly overruled by the court, and that a motion to discharge the defendant upon the ground of variance between the proof and the indictment was properly denied.

That the charge that the defendant, the said goods, "unlawfully and feloniously did steal, take and carry away contrary to the form of the statute in such case made and provided," was a sufficient description of the act to satisfy the provision of section 528 of the Penal Code, which requires, to constitute the crime of larceny, an intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker or any other person.

That as the indictment charged that the defendant did "steal," take and carry away the goods, and as the statute (§ 528) defined the act of obtaining goods by false pretenses as stealing them, the indictment was sufficient as it charged the act and was not required to describe the means by which the act was accomplished.

The cases on this subject, collated and followed by HAIGHT, J.

APPEAL from a judgment of the Court of Sessions of Monroe county, convicting the defendant of the crime of grand larceny in the second degree and adjudging that he be imprisoned in the State prison at Auburn for the term of three years.

*P. Chamberlain, Jr.*, for the appellant.

*J. W. Taylor*, district attorney, for the respondent.

HAIGHT, J. :

The indictment charges that the defendant, on the third day of February, in the year of our Lord one thousand eight hundred and eighty-five, at the city of Rochester, in the county of Monroe, a quantity of carpets, rugs and hassocks, particularly describing them, of the value of \$671, of the goods, chattels and personal property of Ilus F. Carter, then and there being found, unlawfully and feloniously, did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

Upon the trial the district attorney gave evidence tending to show that the defendant purchased of Carter the goods in question, giving therefor his promissory notes, indorsed by one Louis Hensler; that to induce Carter to sell him the goods he produced

an affidavit from Hensler, showing that he was the owner of a farm consisting of thirty-three acres, situated in the town of Little Valley, in the county of Cattaraugus, free and clear from all incumbrances and liens, of the value of \$3,000, and of another farm of twenty-eight acres, situated in the town of Barre, Orleans county, of the value of \$2,500, upon which there was a purchase-money mortgage of \$900, and that the total of his liabilities did not exceed the sum of \$65 over and above the \$900 mortgage; that this affidavit was false, and was known by the defendant to be false at the time that he presented the same to Carter to induce him to sell the goods upon credit. The defendant objected to the evidence tending to show false representations as to Hensler's responsibility, and at the conclusion of the people's evidence asked to have the defendant discharged upon the ground of variance between the proof and the indictment. This was denied and exception taken. The question thus presented is not free from difficulty. The indictment, as we have seen, is in the form approved and usually adopted for the crime of larceny under the Revised Statutes.

Under the Penal Code the crime of larceny has been enlarged so as to embrace the crimes formerly known as false pretense and embezzlement, and is defined as follows: "A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker or of any other person, either, I. Takes from the possession of the true owner or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or, II Having in his possession, custody or control, as a bailee, servant, attorney, agent, clerk, trustee or officer of any person, association or corporation, or as a public officer, or as a person authorized by agreement or by competent authority, to hold or take such possession, custody or control, any money, property, evidence of debt or contract, or article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the

benefit thereof; steals such property, and is guilty of larceny." (Penal Code, § 528.)

Section 275 of the Code of Criminal Procedure provides that the indictment must contain a plain and concise statement of the act constituting the crime, without unnecessary repetition.

It will be observed that under section 528 of the Penal Code there must be an intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker or any other person. The indictment charges the taking to be unlawfully and feloniously, contrary to the form of the statute in such case made and provided, etc. The word "feloniously" means criminal intent, which, used in connection with the words "unlawfully, contrary to the form of the statute in such case made and provided," is a sufficient description of the act to satisfy this provision of the section. Subdivision 1 of the section embraces the taking of money, personal property, etc., from the possession of the true owner, or of any other person, or obtaining from such possession by color or aid of fraudulent or false representations or pretense; in other words, it covers larceny under the Revised Statutes, and the obtaining of money or property by false pretense. Where it is by fraudulent or false representations or pretense, the person charged must take or obtain the money, personal property, etc., from the possession of the true owner, or of any other person, by color or aid of fraudulent or false representations or pretense. He must either take or obtain the possession and where it is so taken or obtained it is defined by the statute to be stealing. Whilst the indictment does not charge the fraudulent or false representations, it does charge that the defendant did steal, take and carry away, etc. In other words, it charges the act, but does not describe the means by which the act was accomplished.

A similar question has been considered by the courts in reference to indictments charging the crime of murder. Under the statute murder may be committed in three ways: First, by a deliberate or premeditated design to effect the death of the person killed; or, second, by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or, third,

when perpetrated by a person engaged in the commission of a felony.

In the case of *Fitzgerald v. The People* (37 N. Y., 413-426), WOODRUFF, J., after referring to the cases, says: "The result of these cases most clearly is, that the crime of murder is sufficiently charged when alleged, as in the present indictment, 'with malice aforethought.' But in order to prove the crime, the proofs must establish a case within the requirement of the statute in one of its three subdivisions. And the party indicted is entitled to proper instructions to the jury as to what facts must be found to sustain the indictment."

In the case of *Cox v. The People* (80 N. Y., 500), the indictment contained the common-law count, charging a felonious killing, with malice aforethought, with other averments necessary in a common-law indictment for murder. It was claimed that there could be no conviction of murder in the first degree under the act making a killing murder, when perpetrated by a person engaged in the commission of a felony. ANDREWS, J., in delivering the opinion of the court, says: "It has been settled by a series of adjudications, commencing with the case of *People v. Enoch* (13 Wend., 159), that a specification in the statute of the cases which shall be deemed murder in the first degree, and the introduction of new definitions or divisions does not necessarily require a change in the form of indictment, and that a conviction under a common-law indictment of murder in the first degree may be had in any case where the offense proved is brought within either of the statutory definitions."

In the case of *The People, etc., v. Conroy* (97 N. Y., 62), the second count of the indictment was in the common-law form, charging that the defendant committed the crime feloniously, willfully and with malice aforethought. RUGER, Ch. J., in delivering the opinion of the court, says: "This count seems to contain all of the allegations necessary to describe the crime of murder in the first degree as defined in the Penal Code. \* \* \* It has never been required, under the strictest and most technical rules of pleading, that the particular intent with which a homicide was committed should be set forth in the indictment; but it has been uniformly deemed sufficient to allege it to have been done feloniously, with

## FIFTH DEPARTMENT, OCTOBER TERM, 1886.

malice aforethought, contrary to the form of the statute. The question as to whether the crime was committed, under such circumstances with reference to intent, as makes it murder in the first degree within the statutory definition, has been held, under several changes of the statute defining that crime, to be one of evidence determinable by the jury under the instructions of the court." (Citing, with approval, the remarks of WOODRUFF, J., in the case of *Fitzgerald v. The People*, *supra*.)

In the case of the *People v. Phelps* (72 N. Y., 350) it was held a sufficient averment of the crime of larceny in the precise words of the statute.

In the case of the *People v. Willett* (4 Eastern R., 897; 102 N. Y., 253), the Court of Appeals held that the ordinary common-law count in an indictment for murder is, notwithstanding the numerous statutory enactments, sufficient to sustain a conviction where the murder was perpetrated while the prisoner was engaged in the commission of a felony. FINCH, J., in delivering the opinion of the court, in speaking upon the subject of an indictment for larceny, says: "That section (528 of the Penal Code) defines, with considerable detail, what acts shall constitute larceny and what intent shall characterize the crime, and in the end provides that he who with such intent does any of such acts, steals such property, and is guilty of larceny. The word "steal" is thus defined by the statute itself as covering all the prescribed details, and its use in the indictment which charges the taking to have been felonious or with a criminal intent, sufficiently includes the particular intent needed to constitute a larceny."

In Virginia the statute makes the obtaining of money or other property, by any false pretense, larceny. In that State the courts hold that an indictment for the offense may be either in the form of indictment for larceny at common law or by charging the specific facts which the act declares shall be deemed larceny. (*Leftwich v. The Commonwealth*, 20 Gratt., 716; *Dowdy v. The Commonwealth*, 9 id., 727-734.) These authorities appear to sustain the respondents' position, and incline us to hold that the indictment is sufficient, and that there was no variance between the proof and the charge.

The case of *The People v. Moore* (37 Hun, 84), has no application, for no such question was involved in the appeal or considered

by the court. We are aware that in California a different rule has been established. (*The People v. Jersey*, 18 Cal., 337; *The People v. Poggi*, 19 id., 600; *The People v. Miller*, 12 id., 291.) But under the authorities of our own State we think these cases cannot be followed.

Again, it is contended by the appellant that there was no written representations made as to the ability of the defendant Dumar to pay for the goods purchased by him, as required by section 544 of the Penal Code. The false representations and pretense complained of did not relate to Dumar's ability to pay, but did relate to Hensler's ability to pay. His representations were in writing, and in the form of an affidavit, subscribed by himself. The false representations and pretense of the defendant Dumar consisted in the presenting of this affidavit to Carter, knowing it to be false, and in statements made to Carter in reference to Hensler's ability to pay. His false representations did not relate to the ability of himself to pay, and consequently was not within the provisions of section 544 of the Code. Numerous exceptions were taken upon the trial to the admission and rejection of evidence, to the charge and the refusal to charge, but none which we consider it necessary to here discuss.

The judgment and conviction should be affirmed.

SMITH, P. J., BARKER and BEADLEY, JJ., concurred.

Judgment and conviction affirmed, and proceedings remitted to the Court of Sessions of Monroe county to proceed thereon.

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WILLIAM T. SLATTERY AND JOHN E. OLMSTEAD,  
RESPONDENTS, v. SAMUEL E. HASKIN, APPELLANT.

*Practice*—motion to dismiss an appeal to the County Court because of a failure of the sureties upon an undertaking to justify—the right to so move is not lost by the service of a notice of retainer or of trial—Code of Civil Procedure, sec. 3069.

On July 23, 1885, a notice of appeal from a judgment recovered by the plaintiff in a Justice's Court was duly served and the undertaking, required by section 3069 of the Code of Civil Procedure, was executed and filed with the justice, but no copy of the undertaking was served upon the respondents, nor



was any notice of the filing thereof. On August eighteenth the attorneys for the respondents served a notice of retainer, and August thirty-first a notice excepting to the sureties upon the undertaking. On the twentieth of November they served a notice of trial, and on the twenty-fifth of November a notice of a motion to dismiss the appeal upon the ground that the appellant's sureties had failed to justify and that no new undertaking had been executed and filed. *Held*, that a claim that the motion should be denied upon the ground that the respondents did not except to the sureties within the ten days provided by the Code, was properly overruled, as no copy of the undertaking, or notice of the filing thereof, was served upon the respondents, and they first learned that the undertaking had been filed on August 24, 1885.

That neither the service of the notice of retainer nor of the notice of trial operated as a waiver of the right of the respondents to move to dismiss the appeal.

APPEAL from an order of the Stenben County Court, permitting the defendant to perfect his appeal by procuring the proper justification and allowance of the sureties named in the undertaking within twenty days, or, in default, that his appeal be dismissed.

*H. Bemus*, for the appellant.

*O. E. Searl*, for the respondents.

HAIGHT, J.:

This action was originally brought in Justice's Court and resulted in a judgment in favor of the plaintiffs for \$174.63. On the 23d day of July, 1885, a notice of appeal was duly served, and the undertaking, with sureties, executed and filed with the justice, but no notice of the filing of the undertaking, or a copy thereof, was served upon the plaintiffs. Thereafter, and on the 18th day of August, 1885, Messrs. Searl & Larkin served upon the appellant's attorney a notice of retainer for the respondents, and on the thirty-first day of August a notice, excepting to the sureties upon the undertaking. On the 20th day of November, 1885, they served upon the appellant's attorney a notice of trial, and thereafter, and on the 25th day of November, 1885, a notice of motion to dismiss the appeal, upon the ground that the appellant's sureties had failed to justify, and that no new undertaking had been executed and filed.

The defendant, in his notice of appeal to the County Court, demanded a new trial in that court, and under section 3069 of the Code, in order to render such an appeal effectual, the appellant must, at the time of the service of the notice of appeal upon the

justice, give the undertaking required by the Code to stay the execution of the judgment. Such undertaking must be in writing, executed by one or more sureties, approved by the justice who rendered the judgment, or by a judge of the appellate court, and a copy of the undertaking, with a notice of the delivery thereof to the justice, must be served with the notice of appeal. (Code, § 3050.) The attorney for the respondent may, within ten days after the service of a copy of the undertaking, with notice of the filing thereof, serve upon the attorney for the appellant a written notice that he excepts to the sufficiency of the sureties. Within ten days thereafter the sureties, or other sureties in a new undertaking to the same effect, must justify before a judge of the court below or a county judge. If the judge finds the sureties sufficient he must indorse his allowance of them upon the undertaking, or a copy thereof, and the notice of the allowance must be served upon the attorney for the exceptant. The effect of a failure so to justify and procure the allowance is the same as if the undertaking had not been given. (Code, § 1335.)

It is now contended that the respondents did not except to the sureties upon the undertaking within the ten days provided by the Code. But, as we have seen, no copy of the undertaking, or notice of the filing thereof, was served upon the respondents or their attorneys, and they are given ten days after such service to except to the sureties. It appears from the moving papers that they first learned that the undertaking had been filed with the justice on the 24th day of August, 1885, and on the 31st of August thereafter they served their notice excepting to the sureties. It would consequently appear that the notice was in time, and that it thereby became the duty of the appellant to have his sureties justify and his undertaking allowed.

Again, it is contended that the respondents, by serving a notice of retainer and of trial, waived the justification of the sureties. It is well settled that parties, by appearing generally, waive irregularities theretofore existing, and may confer jurisdiction upon the court, even though the court, without such appearance, would not have had jurisdiction. (*Bissell v. The N. Y. C. and H. R. R. Co.*, 67 Barb., 385; *The Ogdensburg and Lake Champlain R. Co. v. The Vermont and Canada R. Co.*, 63 N. Y., 176; *Hill v. Burke*,

62 id., 111; *The People ex rel. Jennys v. Brennan*, 6 T. & C., 120-126.)

But in this case the appeal was regularly served, and the undertaking was filed with the magistrate. The most that the respondents could have waived by their appearance was the service upon them of the copy of the undertaking, with the notice of its filing. This did not admit the sufficiency of the sureties, or deprive them of the right to except thereto. By appearing, they could not assume that the sureties would fail to justify, or that the appellant would fail to furnish a new undertaking if required. The right to dismiss the appeal grows out of that which transpired subsequent to the notice of retainer, and consequently was not waived by the service of such notice. The waiver, if any, must, therefore, have been in the service of the notice of trial. But the appellant has failed to call our attention to a single case holding that the service of a notice of trial or argument is a waiver of the right to move to dismiss an appeal, and we are inclined to doubt the propriety of so holding.

In the case of *Beebe v. Marvin* (17 Abb., 194-196), it was held by the General Term of the Superior Court that the plaintiff was not barred from making a motion for judgment upon a sham answer, after having noticed the case for trial; that he was entitled to the earliest disposition of the case that he could get. In the case of *Arnoux v. Homans* (32 How., 332), it was held that the service of a notice of argument of an appeal did not preclude the enforcing payment of the judgment where no stay of proceedings had been granted.

It is true that the appellant was in default in not procuring the allowance of his undertaking at the time the notice of trial was served, but he still had the right to move the court for relief in this regard, and the respondents, not wishing the case to go over another term of the court, may have noticed it for trial without intending or desiring to waive their right to also move to dismiss the appeal.

The order appealed from should be affirmed, with ten dollars costs and disbursements. And the appellant may have twenty days in which to perfect his undertaking under the order appealed from.

BARKER and BRADLEY, JJ., concurred.

So ordered.

FIRST NATIONAL BANK OF UNION MILLS, RESPONDENT,  
v. JUDSON H. CLARK, APPELLANT.

*Practice*—a motion for a new trial on the minutes of the justice can only be made when a verdict has been rendered—Code of Civil Procedure, sec. 999—power of a Special Term to entertain a motion to vacate an order erroneously granted.

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Upon the trial of this action, brought to recover moneys alleged to have been deposited by the plaintiff's assignor with the defendant, a private banker, the plaintiff was nonsuited by the court, upon the ground that it had failed to show a title to the moneys deposited; a motion was thereupon made by the plaintiff for a new trial upon the minutes of the justice trying the case, which was entertained and denied. From this order an appeal was taken by the plaintiff, which is still pending. Subsequently the plaintiff moved, at a Special Term held by the trial judge, for an order vacating the previous orders of the court entertaining and denying the motion for a new trial. From an order granting this motion the defendant appealed.

*Held*, that the trial judge had no authority to entertain the motion for a new trial made upon his minutes, as such a motion can only be made in those cases in which a verdict has been rendered.

That as the order denying the motion for the new trial was erroneous and invalid, it was proper for the Special Term to hear and grant the motion made by the plaintiff to have the said order vacated.

That the plaintiff was not barred from making the motion, because it had taken an appeal from the order denying a new trial.

No opinion was expressed by the court upon the question as to whether the plaintiff could move upon the case as settled for a new trial without first formally discontinuing his appeal, nor as to whether the defendant should be allowed any cost on such appeal.

APPEAL from an order made at the Erie Special Term and entered in Allegany county.

The action, which was tried at the Allegany Circuit, where the plaintiff was nonsuited by the court, was brought to recover moneys alleged to have been deposited by Sliney and Whelan with the defendant, a private banker, the claim for which had been by them assigned to the plaintiff. When the plaintiff rested the defendant moved for a nonsuit, which was granted, on the ground, as the case states, that the plaintiff failed to show a title to the moneys deposited. Thereupon the plaintiff, moved for a new trial upon the minutes, which was entertained by the trial judge and denied. From that order the plaintiff appealed

to the General Term, where it is still pending. Subsequently the plaintiff moved, at a Special Term held by the trial judge, for an order vacating the previous order of the court entertaining the plaintiff's motion for a new trial, and also the order denying the same. The Special Term made an order vacating and setting aside both of the said orders, from which the defendant appealed.

*Rufus Scott*, for the appellant.

*Ainslie & Davie*, for the respondent.

BARKER, J. :

The practice adopted at the circuit is without precedent, and was wholly unauthorized. By section 999 of the Code of Civil Procedure, the trial judge may, in his discretion, entertain a motion upon his minutes, at the same term at which the trial was had, to set aside the verdict and grant a new trial upon exceptions ; or because the verdict is for excessive or insufficient damages ; or otherwise contrary to the evidence, or contrary to law. Here there was a trial, but no verdict ; and the trial judge at the circuit had no jurisdiction, and the order denying a new trial was erroneous and invalid. (*Emmerich v. Hefferan*, 33 Hun, 54 ; *Hill v. Hotchkiss*, 23 id., 414.)

The only question now presented for our consideration is whether the Special Term had jurisdiction to vacate the order made at the circuit, denying the plaintiff's application for a new trial. Upon this question we entertain no doubt. The practice at the circuit was adopted through the inadvertence and mistake of the trial judge. By a proper motion, with notice to the adverse party, the court possesses the power, as it was its duty, to correct the mistake resulting from a misapprehension as to the correct practice in moving for a new trial upon an exception taken to the ruling at the circuit granting a nonsuit.

The court may, in any stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, correct any mistake occurring in the mode of procedure. (Sec. 723 of the Code of Civil Pro.) The plaintiff, in procuring the order appealed from, sought to correct its own mistake, and if relief had not been granted, by vacating the previous orders, it might have

been greatly embarrassed in procuring a hearing upon its exceptions taken to the order granting a nonsuit. Upon the appeal taken from the order denying a new trial, no hearing upon the merits could have been had in this court, for the reason that the order appealed from was invalid, and the judge making the same had no power at the circuit to correct the error in granting a nonsuit if one was made. The defendant has not been prejudiced by the order from which he appeals, for the reason that a motion for a nonsuit yet stands unreversed. The plaintiff was not barred from making the motion because it had taken an appeal from the order denying a new trial. Parties may be relieved from their own errors and mistakes if injustice would be done by refusing relief. The fact that an appeal was pending is not a bar to an application to renew a motion. (*Belmont v. The Erie Railway Co.*, 52 Barb., 637; see note 88 to standing rule No. 37.)

The decision of a motion is not regarded, in the light of *res adjudicata*, with the same strictness as in judgments, and therefore an interlocutory order may be vacated and set aside upon the motion of an aggrieved party, if made in pursuance of the rules and practice of the court. (*Smith v. Spalding*, 3 Rob., 615; *White v. Munroe*, 33 Barb., 654; *Belmont v. Erie Railway Co.*, 52 id., 637; *Simson v. Hart*, 14 Johns., 63.)

A motion at the circuit for a new trial, when it may be entertained after a verdict rendered, is summary in its character, and the decision of the court thereon is not to be regarded with the same consideration as a decision made upon a formal motion and after a deliberate argument. The order of the Special Term, correcting the errors in practice adopted at the circuit, was wisely granted, and the order should be affirmed. The question presented is unlike those which are often presented and considered where a defeated party seeks to renew a motion upon the same or a new state of facts, in which cases the court, to prevent vexatious and repeated applications on the same point, have adopted rules of procedure which are intended to preclude the discussion of the same question, on the same state of facts, without first procuring the permission of the court to reargue the motion. The rules of practice in that class of cases are stated in the following cases, which are cited without comment: *Belmont v. Erie Railway*

FIFTH DEPARTMENT, OCTOBER TERM, 1888.

*Company* (52 Barb., 637); *White v. Munroe* (33 id., 654); *Smith v. Spalding* (3 Rob., 115); *Snyder v. White* (6 How. Pr., 321); *Erie Railway Company v. Ramsey* (57 Barb., 449).

The order appealed from was granted, without costs to either party, and no disposition was made of the appeal taken by the plaintiff from the order made at the circuit, denying a new trial. The only ground of complaint which the defendant can make is, that the appeal is not disposed of on vacating the order, and on such terms as to costs as would be just and fair to him. If he desired that the appeal should have been disposed of at that time he should have brought the question before the court for its decision.

We express no opinion upon the question whether the plaintiff can move upon the case as settled for a new trial without first formally discontinuing his appeal, nor whether the defendant should be allowed any costs on such appeal.

In view of the somewhat peculiar features of the case, as presented on this appeal, we affirm the order, without costs to either party.

HAIGHT and BRADLEY, JJ., concurred; SMITH, P. J., not sitting.

Order affirmed, without costs.

YETTE THALHEIMER, APPELLANT, v. FERDINAND HAYS  
AND JACOB THALHEIMER, DEFENDANTS.

SUSELIA HAYS, JUDGMENT CREDITOR, RESPONDENT.

SALIE FRANKEL, APPELLANT, v. THE SAME.

SUSELIA HAYS, JUDGMENT CREDITOR, RESPONDENT.

*Practies — motion to vacate an attachment — when it may be made after the denial of a previous motion therefor — Code of Civil Procedure, sec. 683.*

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Under the provisions of section 683 of the Code of Civil Procedure an interested party may, as a matter of right, move to dismiss an attachment granted upon the ground that the defendants had disposed of their property with an intent to defraud their creditors, upon affidavits disproving or explaining the case made by the plaintiffs, although a motion to vacate the attachment, founded upon the papers used by the plaintiff in procuring it, has already been made and denied.

APPEALS from orders made at the Monroe Special Term vacating, upon the merits, the warrants of attachment granted in the above-entitled actions.

In each of these actions the plaintiffs, on the 7th day of July, 1884, procured an attachment against the property of the defendants, on the ground that they had disposed of and secreted, and were about to dispose of and secrete their property, with an intent to defraud their creditors. On the 8th of July, 1884, Suselia Hays, wife of the defendant Hays, procured and docketed a judgment against the defendants for the sum of \$13,000, and issued execution thereon and placed the same in the hands of the sheriff. On the day following she procured an order requiring each of the plaintiffs to show cause, at a Special Term, on the eleventh of July, why the said attachments should not be vacated, for the reason that the affidavits upon which the attachments were granted were insufficient. The motions were finally heard in December, and in January, 1885, and were denied, with costs.

On the 11th day of December, 1884, Suselia Hays made another motion in each case, to set aside and vacate the said attachments based upon affidavits disproving the facts upon which the granting of the attachments were based, which motions came on to be heard on the 19th of December, 1884, at the Special Term. The hearing of these motions was postponed, from time to time, and they were finally heard and disposed of on the 26th of February, 1886, orders being then made vacating both of said attachments. From the last named orders the plaintiffs have appealed.

*J. & Q. Van Voorhis*, for the plaintiffs, appellants.

*J. B. Perkins*, for Suselia Hays, judgment creditor, respondent.

**BARKER, J.:**

The appellants contend that by making the first motion, and the final determination thereof after the making of the second motion, superseded the motion last made and was, in effect, a rehearing of the same question, and for those reasons was irregular and erroneous, and should have been denied upon that ground. The intervening creditor, Susella Hays, contends that each motion was made upon separate and distinct grounds, and could be separately made and



prosecuted at the same time, with strict regularity. Her position is, that the first motion was founded upon the affidavits upon which the attachments were granted, and she sought to vacate the same for the reason that the affidavits were insufficient in matter of substance and the officer acquired no jurisdiction over the subject-matter; that the second motion was based upon affidavits disproving the ground upon which the attachment was issued, and that the same were properly vacated upon the proofs refuting the case made by the plaintiffs.

If these positions are supported by the history of the case, as the same appears in the record, then the denial of the first motion did not supersede the second motion and the same remained in court to be disposed of upon the merits. The lien of the intervening creditor attached to the property after the attachments were issued, and upon sufficient grounds she could apply to vacate the attachments. (Code Civil Pro., § 682 )

Under section 683 the motion to vacate may be founded upon the application and proofs upon which the warrant was granted, and can be made to the court or to the judge who granted the same, without notice; or the motion can be made upon the proof by affidavit on the part of the lienor, in which case it must be upon notice, and could have been made to the court or to the judge who granted the warrant, and, in that case, the motion may be opposed by new proof by affidavit on the part of the plaintiff, tending to sustain any of the grounds upon which the attachment was granted, as recited in the warrant. One motion is summary in its character and is based upon the insufficiency of proofs, and no notice is required to be given of the application on the supposition that the same was granted inprovidently by the officer. The other is in the nature of a trial, where the parties produce proofs on each side of the question in dispute, and the opposing party is entitled to be heard upon notice, and the questions involved may be entirely distinct from those which can be investigated in the *ex parte* application.

We are of the opinion that, under the provisions of section 683, an interested party may, as a matter of right, move to dismiss the attachment upon the merits, founded upon affidavits disproving or explaining the case, made by the plaintiffs, although a motion to vacate has been denied, founded upon the plaintiffs' affidavits

used in procuring the attachment; they are essentially different proceedings. To give the section a contrary construction would greatly embarrass defendants and lienors in attachment proceedings, for they might hesitate to make a summary application unless the plaintiff's case was defective beyond all doubt, as they would, if defeated, bar themselves of all right to proceed upon their own proofs and in a more deliberate manner. These views are supported by the suggestions made in *Steuben County Bank v. Alberger* (75 N. Y., 179, and, also, 83 N. Y., 274), in a case between the same parties. The doctrine of *res adjudicata* does not apply with the same strictness to decisions in interlocutory motions as it does to judgments. Courts, to prevent vexatious and repeated applications on the same point, have rules which preclude the agitation of the same question on the same state of facts. (*Belmont v. The Erie Railway Co.*, 52 Barb., 637; *Ramsey v. The Erie Railway Co.*, 57 id., 450; *Smith v. Spalding*, 3 Rob., 615.)

From the papers contained in the appeal-book we are unable to say that the first motion made was founded upon proofs made by the moving party, and there are some reasons for holding that it was based only, so far as the facts are concerned, upon the plaintiffs' affidavits. The order appealed from does not recite that the point was made on the final hearing that the previous motion had been denied, although it does state some other objections were made by the appellants, which were overruled. Upon the final hearing the appellant also presented many objections, in writing, to the granting of the motion, but the one we are now considering was not made, although the fact that the former motion had been denied by another Special Term was brought to the attention of the court. The question is, after all, nothing more than one of irregularity in procedure, and the court is governed entirely by its own rules whether the same matter shall be reheard or not.

Upon the merits, we concur with the Special Term in setting aside the attachments, as the proofs upon the question of the fraud of the defendants, in disposing of their property, is substantially the same as they were in the case of Ignatz Thalheimer against these defendants, where we sustained an order of the Special Term, made by the same learned judge who granted the orders now before us, setting aside an attachment granted in that action.

On the hearing of this appeal the original record was handed up with the printed papers, and by it it appears that the point is not well made, that the motion was not founded upon original papers, except as to the objection to the affidavit of Abe Strauss, which the respondent admits is only a copy of an original affidavit which had been previously used on a similar motion in a case where the said Ignatz Thalheimer was the plaintiff. This affidavit was incompetent, and should have been excluded on the plaintiff's objection. But it appears, upon reading the other affidavits, that the facts stated in this paper were substantially stated by the other witnesses, and we are of the opinion that the moving party fairly made out a case for vacating the attachments, independently of Strauss's affidavit, and that the order should not be reversed for the error in permitting the copied affidavit to be read.

Several affidavits, taken in the State of Indiana, were read by the moving parties, over the appellant's objection that they were not properly certified as required by section 844 of the Code. To the original papers there is attached a certificate by the proper officer, in full compliance with section 844. The same purports to be made upon the 27th day of February, 1886, one day after the orders were entered granting the motion. The original certificates were taken from the files, and on the argument of this appeal were exhibited to the court for its inspection, for the purpose of meeting the objection, and at that time the appellant made no claim that the certificates had been improperly made part of the record. We may, therefore, properly assume that they were so attached with the consent of the parties, or by an order of the court. We have examined each of the other points made upon the argument, or as found in the appellant's printed brief, and we fail to discover any such error or irregularity as should lead to the reversal of the judgments.

The orders appealed from are affirmed, with costs and disbursements in one of the cases.

HAIGHT and BRADLEY, JJ., concurred; SMITH, P. J., not sitting.

Order in each case affirmed, with ten dollars costs and disbursements in one case.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.*  
 JAMES B. PECK, RESPONDENT, *v.* FRANCIS M. CONLEY  
 AND OTHERS, TRUSTEES OF THE FIRST SOCIETY OF THE METHODIST  
 EPISCOPAL CHURCH OF THE TOWN OF COHOCTON, APPELLANTS.

*Jurisdiction of the court to restrain the trustees of a religious corporation from diverting its property from the church or denomination to which the corporation is attached — 1875, chap. 79, and 1876, chap. 176 — when the trustees will be compelled by a mandamus to open the meeting-house to a minister regularly appointed to that place.*

The appellants are the trustees of the First Society of the Methodist Episcopal Church of the town of Cohocton, organized in 1829 under the general law of 1818. In the year 1831 the local society received a conveyance of a parcel of land, upon which a meeting-house has since been erected, in which the grantees were mentioned and described as "Paul C. Cook (and four others), trustees of the First Methodist Episcopal Society of the town of Cohocton, and their successors in office," but which contained no conditions or other reference to any religious organization. By the custom, regulations and discipline of the Methodist Episcopal Church, the bishop presiding at an annual conference possesses full authority, and is charged with the duty, to make the appointment of preachers for the several local districts within his conference.

The relator, a minister of the gospel in good standing in the Methodist Episcopal Church, having been appointed by the bishop presiding at the annual conference held for the year 1885, as the preacher to be located in the Cohocton district, and to occupy for religious purposes the meeting-house owned by the corporation of which the appellants are the trustees, applied to them to be received as the minister of the society and to be allowed to open and use the meeting-house for the purpose of conducting religious exercises. The trustees having refused to receive the relator or to open the meeting-house, he applied for and obtained a *mandamus* compelling them so to do.

*Held*, that since the passage of chapter 79 of 1875, and chapter 176 of 1876, the courts have, by force of the provisions contained in the said acts, jurisdiction to supervise the action of the trustees of religious corporations and to require them to use and manage the property of the corporation according to the rules and usages of the church or denomination to which the corporation belongs, and to restrain them by appropriate orders and decrees in actions or proceedings properly instituted for that purpose by interested parties from diverting the property held by them as trustees, or from using the revenues which come into their hands except for the support and maintenance of the church or denomination to which they are attached.

*Isham v. Fullager* (14 Abb. N. C., 863); *First Reformed Presbyterian Church v. Bowden* (Id., 856); *Isham v. The Trustees of the First Presbyterian Church of Dunkirk* (63 How., 495), followed.

That it was the duty of the trustees to receive the relator as minister, and to open the meeting-house to him for the purpose of conducting divine worship therein, in conformity to the tenets and discipline of the religious denomination to which he and the corporation was attached.

That in refusing to open the meeting-house the trustees violated a plain duty, and that the writ of *mandamus* was a proper remedy to put the relator in possession of the pulpit to which he was entitled.

APPEAL from an order of the Monroe Special Term, granting a peremptory writ of *mandamus* requiring the appellants to receive the relator as the minister of the society of which they are the trustees, and to open the meeting-house, of which they have charge, to the said relator, for the purposes of conducting religious exercises therein, in conformity to the faith, tenets and discipline of the Methodist Episcopal Church, and to do certain other things, specifically mentioned, of less importance, and referred to in the opinion.

*T. M. Connelly*, for the appellants.

*McMaster & Parkhurst*, for the respondent.

BARKER, J. :

The relator is a minister of the gospel, in good standing, of the religious denomination and organization known as the Methodist Episcopal Church. The appellants are the trustees of the First Society of the Methodist Episcopal Church of the town of Cohocton, organized in the year 1829, under the general law of 1813 (chap. 60), permitting the creation of religious corporations. This corporation is located within the territorial limits of the Genesee Conference of the said denomination, over which Bishop Hurst presided at the annual conference held in the year 1885. In the year 1831 the local society received a conveyance of a parcel of land, upon which a meeting-house has since been erected, and the grantees therein are mentioned and described as "Paul C. Cook and four others, trustees of the First Methodist Episcopal Society of the town of Cohocton, and their successors in office; of the second part." No conditions are inserted in this conveyance upon which the title vested in the trustees is made to depend; nor is any reference made therein as to the religious organization to which the said corporation belongs, other than is found in the clause describing the official character of the trustees.

By the custom, regulations and discipline of the Methodist Episcopal Church, the bishop presiding at an annual conference possesses full authority, and is charged with the duty to make the appointments of preachers for the several local districts within his conference. At the conference held in 1883, Bishop Hurst, in due form, appointed the relator as the preacher to be located in the Cohocton district, and to occupy for religious purposes the meeting-house owned by the corporation of which the appellants are the trustees. They refuse to receive the relator in his capacity as preacher, and refuse to open the meeting-house, that he may conduct religious services therein, in accordance with the rights, ceremonies and discipline of the Methodist Episcopal Church, to which the local society and corporators were attached. The trustees were supported in their action in this respect by a majority of the congregation and communicants belonging to the local society. The trustees justify their action, morally and as members of the religious society, upon the ground that they were dissatisfied, as a body, with the action of the conference and the bishop in appointing the relator as the preacher of their society, and specify as the chief reason of their opposition that the relator is entirely incompetent to perform the duties of pastor, and without talent to edify or instruct the people.

As a legal justification, and for the purpose of defeating the relator's application, they claim that the corporation of which they are the trustees is a civil one, independent of all ecclesiastical judicatories, and that the civil courts are without jurisdiction to guide or control their action in the management of the temporalities of the church, over which they have the same control that the trustees or directors of business corporations have and possess, by the general laws of the State. In this contention they would have been supported by the construction which the courts have placed upon the general act of 1813, prior to its amendment by chapter 79 of the Laws of 1875 and chapter 176 of the Laws of 1876. (*Robertson v. Bullions*, 11 N. Y., 243; *Petty v. Tooker*, 21 id., 267.)

In those cases it was held that the members of the society or corporation form the corporate body, such members being the corporation, and the trustees the mere officers of the corporation; that

the body or entity thus brought into existence is a civil corporation, with such functions and powers as the statute confers upon it and its officers, and that in no sense was it an ecclesiastical corporation; that it was wholly independent, in its existence and in the control and management of its affairs, of all religious judicatories; that it is a creature of the State, and subject to such control as its own laws may impose; that none of the provisions of the act of 1813 were intended to disturb, interfere with or regulate the actions and powers of the numerous voluntary religious organizations existing in this State, and that such bodies were recognized and considered as entirely spiritual associations, distinct and separate from the body politic.

Since those decisions were made, giving a construction to the original act, supplemental provisions have been enacted which provide that the rectors, wardens and vestrymen, or the trustees, consistory or sessions of any church, congregation or religious society, incorporated under any of the laws of this State, shall administer the temporalities thereof, and hold and apply the estate and property belonging thereto, and the revenues of the same, for the benefit of such corporation, according to the rules and usages of the church or denomination to which said corporation shall belong; and it shall not be lawful to divert the estate, property or revenue to any purpose except the support and maintenance of any church or religious or benevolent institution or object connected with the church or denomination to which such corporation shall belong. (Laws of 1876, chap. 176, § 1.)

The legislature had previously enacted (Laws of 1875, chap. 79) that the jurisdiction of courts of equity was extended over religious corporations, so far as it may be necessary to enforce the provisions of that act, which provided that the trustees of any church, congregation or religious society, incorporated under section 3 of the act of 1813, shall administer the temporalities thereof, and hold and apply the estate and property belonging thereto, and the revenues of the same, for the benefit of such corporation, according to the discipline, rules and usages of the denomination to which the church members of the corporation belong; nor shall it be lawful for the trustees to divert such estate, property or revenues to any other purpose, except towards the support and maintenance of any

religious, benevolent or other institution connected with such church, congregation or religious society.

This court has, by its previous decisions, placed a construction upon these amendments or supplementary provisions to the original act, and held that the courts, by force of their provisions, have jurisdiction to supervise the action of the trustees of religious corporations and to require them to use and manage the property of the corporation according to the rules and usages of the church or denomination to which the corporation belonged; and when they attempt to divert the property, of which they have the title as trustees, or to use the revenues which may come to their hands, except for the support and maintenance of the church or denomination to which it is attached, to restrain their action by appropriate orders and decrees in actions or proceedings properly instituted for that purpose by interested parties.

In *Isham v. Fullager* (14 Abb. N. C., 363), it was held at Special Term that the trustees could be properly restrained, under the amendatory clauses, from opening the church building to the ministration of a minister who had been deposed from his office by the action of an ecclesiastical judicatory to which he and the society belonged. This case was affirmed at General Term, on the opinion of the justice who presided at the Special Term. The same views were again expressed by this court in the case of *The First Reformed Presbyterian Church v. Bowden* (14 Abb. N. C., 356). The same questions were up for consideration and the same conclusions reached in *Isham v. The Trustees of the First Presbyterian Church of Dunkirk* (63 How., 495).

In the examination of the case at bar we have re-examined the questions involved in the discussion and are confirmed in our views as previously expressed, and, upon the authority of the cases cited, we hold that it was the duty of the trustees to receive the relator as the minister assigned to the district of the First Methodist Episcopal Church of Cohocton, and to open the meeting-house to him for the purpose of conducting divine worship therein in conformity to the tenets and discipline of the religious denomination to which he belongs and to which the corporation is attached. In refusing to open the meeting-house the trustees violated a plain duty, and the writ of *mandamus* is a proper remedy to put the



relator in possession of the pulpit to which he is entitled. (*People v. Steele*, 2 Barb., 397.)

As to the personal property described in the writ, the trustees deny, that the corporation has title to the same, and state, in their affidavits, that they have no control over the same, naming the persons in whose possession the same is. The relator failed to establish, in the face of these denials, that the trustees held the property for the use of the resident minister and, so far as they are required to deliver the same to the custody of the relator, and for his use, the writ should be amended by striking out that requirement.

As no point was made by the appellants that the record book mentioned in the writ was not intended to be used by the minister, for the purpose of keeping the records of the church, we allow the writ to stand in that particular, although we find no canon, in the book of discipline handed up to us, giving him charge of the records of the society or corporation.

The order and the writ, as amended, are affirmed, without costs of this appeal to either party.

SMITH, P. J., and BRADLEY, J., concurred ; HAIGHT, J., not sitting.

Order and writ modified as indicated in the opinion, and as modified affirmed, without costs of this appeal to either party.

THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-  
ENTS, v. HENRY PENHOLLOW, APPELLANT.

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*Amendment to the United States Constitution requiring the accused to be confronted with the witnesses against him — not applicable to trials in State courts for State offenses — construction of this provision in the bill of rights of the State of New York — right of the accused to testify as to a conversation with a witness who has testified as to a confession made by him — right of the accused to cross-examine a witness in order to show bias against him.*

Upon the second trial of the defendant for the crime of extortion the people were allowed, against the defendant's objection and exception, to read in evidence the testimony of a witness who had been produced and examined on the former trial, but who was dead at the time of the second trial.

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FIFTH DEPARTMENT, OCTOBER TERM, 1886.

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*Held*, that an objection to the admission of the evidence, as being a violation of the sixth article of the amendment of the Constitution of the United States, providing that in all criminal prosecutions the accused should be confronted with the witnesses against him, was not well taken, as the right secured by this clause of the Constitution is limited in its application to citizens of the United States on trial in the Federal courts charged with a violation of the Constitution of the United States or the laws of congress.

That the similar provision contained in the bill of rights of the State of New York did not require that the accused should in all cases be confronted with the witnesses against him upon a pending trial of the indictment, but is satisfied, in cases of necessity, if the accused has been once confronted by the witness against him, in any stage of the proceedings upon the same accusation, and has had an opportunity of a cross-examination by himself or by counsel in his behalf.

The offense consisted in extorting from one Reubly the sum of five dollars to prevent his arrest for stealing one dollar from one Sliker. The people called as a witness one Kapple, who testified to the confessions of the prisoner made to him at a time and place mentioned by the witness. He testified, in substance, that the prisoner admitted to him some of the facts and circumstances upon which the people relied to secure a conviction; and he further stated that the prisoner said that his purpose in exacting the five dollars from the prosecutor was to secure revenge, and as the opportunity occurred he took advantage of it and redressed a wrong which the prosecutor had done him on a former occasion. The prisoner, having been called as a witness in his own behalf, was asked by his counsel to state the conversation which he had with Kapple. An objection by the people's counsel, interposed without any reason being stated therefor, was sustained by the court, which stated to the prisoner that any conversation which he had with Kapple in reference to the payment of the money, or in regard to the motive in going to the house of the prosecutor, was proper, but anything further was not.

*Held*, that the limitation thus placed on the right of the prisoner to state as a witness all the conversation which he had with the witness Kapple was erroneous, as he had a right to give his version of the interview and all the conversation which passed between the parties as he claimed it to be.

On the cross-examination of Kapple he stated that he was not fond of the defendant, and that he did not speak kindly to him. He was asked: "Did you tell Penhollow last week that he was guilty and you knew it?" Upon a general objection interposed by the district attorney the court refused to allow the witness to answer.

*Held*, error; that the defendant had the right to put the question as bearing upon the question as to whether the witness had any bias, prejudice or hostility against him.

That his right so to do was not affected by the fact that the witness had already admitted that he did not feel kindly to the defendant, as the latter had the right to show when, where and the peculiar circumstances under which the witness had displayed his prejudice and bias, so that the jury might the better determine in what degree, if any, the witness' credibility had been impeached.

APPEAL from a judgment of the Court of Sessions of Chautauqua county, entered upon a verdict convicting the appellant of the crime of extortion, and sentencing him to the Auburn State prison for the period of one year at hard labor.

The offense consisted in extorting from one Reubly the sum of five dollars, to prevent his arrest for stealing one dollar from one Sliker.

*Record & Hooker*, for the appellant.

*A. B. Ottoway*, district attorney, for the People.

BARKER, J. :

The evidence upon which the appellant's conviction stands is conflicting, but it fairly tends to establish his guilt. As the judgment should be reversed and a new trial granted for error of law appearing in the record, we have not examined the evidence with the same attention we would have done if the question of the insufficiency of the proof to establish the offense charged was the only question presented for our consideration. A previous trial had taken place on this indictment, in the same court, which resulted in a disagreement of the jury. On that trial the People produced and examined as a witness Chloe Reubly, who gave material evidence tending to prove the guilt of the accused. At the time of this trial the witness was dead, and the People offered to read in evidence her testimony, as given on the former trial. To the reception of this proof the defendant objected, on the ground that it was incompetent and unconstitutional, being in violation of the sixth article of the amendments to the Constitution of the United States, which provides that in all criminal prosecutions the accused shall be confronted with the witnesses against him. This provision has no application to criminal trials in the State courts for a violation of State laws. This right, secured to the accused, is limited in its application to citizens of the United States on trial in the Federal courts, charged with a violation of the Constitution of the United States or of the laws of Congress. This clause of the Constitution, relied upon by the accused as a ground of his objection, has been frequently and deliberately interpreted by the Federal courts, and the decisions are so full, emphatic and conclu-

sive that it is only necessary to cite the cases where the rule as stated may be found. (*Barron v. Mayor, etc., of the City of Baltimore*, 7 Peters, 247; *Withers v. Buckley*, 20 How. [U. S.], 84; *U. S. v. Cruikshank*, 92 U. S., 542; *Walther v. Sauvinet*, 92 id., 90; *People v. Williams*, 35 Hun, 516.)

Our own State Constitution does not contain any provision securing to the accused the right and privilege of being confronted by the witnesses against him. In the bill of rights adopted by the legislature there is a provision similar to the one embraced in the Constitution of the United States, and expressed in the identical words, to wit: "In all criminal prosecutions the accused \* \* \* has a right to be confronted by the witnesses against him." The accused was confronted by the witness on the former trial and he had an opportunity of making a cross-examination, and that satisfies the requirements of the statutes. The rights secured to the accused, it is to be observed, is "to be confronted with the witnesses against him." This language does not require that the accused shall, in all cases, be confronted with the witnesses against him upon a pending trial of the indictment. The courts have held that the statute is satisfied, in cases of necessity, if the accused has been once confronted by the witness against him in any stage of the proceedings upon the same accusation and has had an opportunity of a cross-examination, by himself or by counsel, in his behalf. (*People v. Newman*, 5 Hill, 295; *Crary v. Sprague*, 12 Wend., 41; *People v. Williams*, 35 Hun, 516; *Brown v. The Commonwealth*, 73 Pa., 321.)

Mr. Colby, in his work on Constitutional Limitations ([3d ed.,] 318), in commenting on constitutional provisions of this character, remarks: "If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane or sick and unable to testify." By the rule thus well established it was clearly competent to read the evidence of the deceased witness, as given on the former trial, notwithstanding the protest of the prisoner.

The people called as a witness one Kapple, who testified as to

the confessions of the prisoner made to him at a time and place mentioned by the witness. He testified, in substance, that the prisoner admitted to him some of the facts and circumstances upon which the people relied to secure a conviction, and he further stated that the prisoner said that his purpose in exacting the five dollars from the prosecutor was to secure revenge, and as the opportunity occurred he took advantage of it and redressed a wrong which the prosecutor had done him on a former occasion. The prisoner was called as a witness in his own behalf, and gave a detailed statement of the facts and circumstances connected with the accusation as charged in the indictment. He admitted that he had met Kapple and had a conversation with him at the time and place mentioned by that witness. The counsel for the prisoner then requested him to state the conversation he had with Kapple. The people's counsel interposed an objection, without stating the reason upon which it was made, and the same was sustained by the court and the defendant took an exception. It may be understood from the case that the court, at the time of making this ruling, stated to the prisoner that any conversation which he had with Kapple in reference to the payment of the money or in regard to the motive in going to the house of the prosecutor was proper, but anything further was not. It does not appear from the record that the prisoner related any part of the conversation he had with the witness Kapple. We think it very clear that the limitations thus placed on the right of the prisoner to state, as a witness, all the conversation which he had with the witness Kapple was erroneous, as he had a right to give his version of the interview and all the conversation which passed between the parties as he claimed it to be.

Kapple testified that the prisoner stated that "Mr. Reubly had swindled him on some oats some time, and he declared that if he ever had the opportunity he would have revenge, and this opportunity came up and he took advantage of it after hearing Mrs. Edwards state that he picked up a dollar. That is the substance of the conversation." Under the ruling of the court the prisoner was deprived of giving the language used at the interview, as he claimed it to be, and from denying that he had declared that he would have revenge against the prosecutor. The people, by Kapple's evidence, sought to

prove that the prisoner had the motive of revenge in extorting from the prosecutor the sum of five dollars.

The same witness, on his cross-examination, was interrogated as to the state of his feelings against the prisoner, and he stated that he was not "fond" of the defendant; that he "did not speak kindly to him." He was then asked this question: "Did you tell Penhollow last week that he was guilty, and you knew it?" The district-attorney interposed a general objection to the inquiry, and it was sustained by the court.

We think the exclusion of the inquiry was error. It is always a material question on the trial of causes, either civil or criminal, to ascertain the state of feeling on the part of the witness toward one or both of the parties, and, upon cross-examination, to inquire whether the witness has any bias, prejudice or hostility toward the party against whom he is called to testify, as bearing on his credibility, so the witness may be asked as to anything that may in the least affect his credit. If the matter rejected would tend to depreciate the credibility of the witness, it is the right of the party against whom he is called to produce it, and does not rest in the discretion of the court whether to receive or exclude it. This proposition is elementary, and is so stated by text writers, and the authorities are all one way upon the subject. (1 Greenl., § 450; *People v. Cunningham*, 1 Denio, 536; *Starks v. The People*, 5 id., 108; *Breen v. The People*, 4 Park. Cr., 380; *Martin v. Farnham*, 5 Foster [25 N. H.], 199; *Atwood v. Welton*, 7 Conn., 71; *Pierce v. Gibson*, 9 Vt., 222.)

There is no rule of evidence about which there can be less doubt. There is sometimes a difficulty in determining whether the fact sought to be proved is of such a nature and character that the jury might act upon it in discrediting the witness. But whenever it has that tendency, though in the least degree, its reception cannot be rejected without error. We must assume that the witness, if he had been permitted to answer the question, would have answered it in the affirmative. If the remark, which the question implies the witness made, had been addressed to a third person, a friend or neighbor of the defendant, no one would doubt, I think, but that the making of the statement would indicate a bias or prejudice on the part of the witness toward the accused. It would be indicative

of an unfriendly as well as of an unkind spirit. It is insulting in its character, and if friendship before existed, such a statement well might and would, naturally, terminate friendly feelings. To say of an accused person, who asserts his innocence before trial, that he is guilty of the accusation charged upon him, if followed up by a remark on the part of the speaker that he knows it to be true, has the natural tendency to injure the accused and to prejudice his case in the minds of his friends and neighbors and with the public generally, and to deprive him of such proper assistance and sympathy as most accused persons may expect from friends and acquaintances.

In support of the ruling the learned district attorney makes the point that, as the witness had already admitted that his feelings toward the defendant were not kind, it was not for that reason error to exclude the evidence which was only showing how such unkind feelings had been manifested. The defendant had the right to show when, where and the peculiar circumstances under which the witness had displayed his prejudice and bias, that the jury could the better determine in what degree, if any, the witness' credibility had been impeached. As the witness gave evidence as to the defendant's confessions, a class of evidence always received with distrust, and in this case capable of contradiction only by the defendant himself, we think that he may have been injured by excluding the evidence.

The defendant took other exceptions during the trial which would require a close examination, except for the fact that a new trial must be granted for the reasons stated.

Judgment reversed, new trial granted, and the proceedings remitted to the Chautauqua County Court of Sessions, with directions to proceed.

SMITH, P. J., HAIGHT and BRADLEY, JJ., concurred.

Judgment and order reversed and new trial ordered, and for that purpose the proceedings are remitted to the Court of Sessions of Chautauqua county.

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EMILY J. SMITH, RESPONDENT, v. JEREMIAH B. ROGERS,  
APPELLANT.

*Executory contract for the sale of land — when it is terminated by a conveyance of the fee of the land, to a stranger, by the vendor.*

This action was brought by the plaintiff to recover money paid by her to the defendant under an executory contract for the purchase of land owned by him, upon the ground that after she had made several payments, and at a time when she was not in default, the defendant had sold and conveyed the premises to one Hill, who had knowledge of the existence of the contract of sale.

*Held*, that the defendant by conveying the fee of the land to Hill terminated the contract, and that as the plaintiff had up to that time, in all respects, performed the agreement on her part, she was at liberty to bring this action to recover the money so paid.

That it was not necessary that she should offer to pay the balance of the purchase-money and demand a deed of the premises, as the defendant had put it out of his power to perform the contract on his part.

That she was not prevented from bringing this action by the fact that Hill knew of the contract at the time he took the deed, and that the plaintiff might have enforced a specific performance of the contract against him.

APPEAL from a judgment in favor of the plaintiff, entered in Cayuga county upon the report of a referee.

The action was brought to recover the purchase-money paid by the plaintiff as vendee to the defendant as vendor, on an executory contract for the sale of real estate. The vendor was the owner in fee of the premises at the time the contract of sale was executed and delivered.

The vendee paid part of the purchase-price, as stipulated in the agreement, and after making several payments and not being in default on her part, the vendor sold and deeded the premises to one Hill, who was advised of the existence of the contract of sale. The plaintiff recovered on the trial before a referee the amount of the moneys she had paid to the vendor, up to the time the latter deeded the premises to Hill.

*Chester & Elliott*, for the appellant.

*A. L. Johnson*, for the respondent.

BARKER, J. :

I am of the opinion that the judgment entered upon the report of the learned referee should be affirmed, upon the ground that the

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defendant repudiated the agreement on his part by selling and conveying the premises to Hill on the 29th day of December, 1884. At that time the plaintiff was not in default. The contract contained a provision expressed in these words: "And in case default is made, as aforesaid, then, and in that case, the vendee releases and discharges the vendor from all liability by reason of any payment made prior to such default."

The first question presented is, whether the vendor had been released from his covenant at the time he conveyed the premises to Hill, by reason of any default on the part of the vendee to make the payments of principal and interest in the sums and at the times stipulated in the agreement. By the terms of the contract, interest upon the unpaid principal was to be paid semi-annually, on the thirteenth of March and the thirteenth of September, and of the principal sum ten dollars was to be paid each month from and after the 3d of July, 1883. The contract also contains the further provision, that unless all payments are made at the time of making the semi-annual indorsement, as provided for in the contract, then the vendee agreed to surrender up all claims and possession of said premises, and waives all notice to quit the same, and agreed to quietly and peaceably remove therefrom, on verbal notice so to do, and the contract should then become null and void.

The referee found that the vendee paid the interest due on the principal sum up to and including the 13th day of March, 1884. And he also finds that she paid other sums of money, giving the dates and amounts, which were received by the defendant upon the contract. He has not found, specifically, that the vendee had, up to the time of making the conveyance to Hill, made all the payments which had fallen due prior to that, but the evidence would fairly justify a finding that she had done so. If all the payments of money that were in fact made by the vendee to the vendor, were applied upon the contract, then she was ahead in her payments at that time.

For the purpose of sustaining the judgment we are to assume that the referee did find that all these payments were made upon the contract; and that no part of the same were left unapplied so that the vendor was at liberty to apply the same upon the items which he claimed were extra work and constituted an independent

item of indebtedness. As I figured the amount due on the 29th day of December, 1884, the principal and interest could not exceed \$293. There were seventeen monthly installments due up to that time, and in all amounting to \$170. Call the interest \$123, which was something above the amount due on an accurate computation, the gross sum paid by the vendee up to that time was \$388.

As the plaintiff was not in default at the time the vendor conveyed the premises to Hill, we are now to inquire whether, upon the other facts appearing in the case, she was entitled to recover the money which she had advanced upon the contract. The vendee's position is this: That the act of the defendant, in conveying the premises to Hill when she was not in default, amounted to a rescission of the contract on his part, and that she had a right of action for the purpose of recovering back the purchase-money which she had paid in upon the agreement, and that, under the circumstances presented by the case, it was not necessary for her to offer to perform the contract on her part, or to require performance by the vendor, but that she could, immediately upon the execution and delivery of the deed, treat the contract as at an end.

The principal covenant on the part of the vendor was to sell and convey to the vendee, by a good and sufficient deed of conveyance, free and clear from all incumbrance, the premises mentioned, for the sum of \$400, the deed to be delivered to the vendee when she had paid one-half of the purchase-money and concurrently therewith. The latter agreed to give her bond for the payment of the balance of the purchase-money, secured by a mortgage on the premises conditioned to pay such balance in annual payments of \$100, together with interest. There was an agreement on the part of the vendor to erect upon the lot a house, at a cost not exceeding \$800, which was to be regarded as a part of the purchase-money, thus increasing the consideration money to the sum of \$1,200.

In every executory contract for the sale of lands there is an implied warranty on the part of the vendor that he has a good title to the premises which he assumes to sell, unless such warranty is expressly excluded by the terms of the contract, and such implied warranty exists so long as the contract remains unexecuted. (*Burwell v. Jackson*, 5 Seld., 535.) In that case the court, in its opinion, remarked: "In respect to such agreements, the principles

upon which the doctrine of implied warranty rests, are still applied as well in England as in this country, with all their force. It has been repeatedly held in England that a purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title knowing its defects; and these decisions have been made without any regard to the particular language of the agreement to purchase. They rest upon the principle of implied warranty of title, and can have no other basis." (Citing *Purvis v. Rayer*, 9 Price, 488; *Souter v. Drake*, 5 Barn. & Adol., 992.) In the latter case Chief Justice Denman said: "For the reason above given, we come to the conclusion that, unless there be a stipulation to the contrary, there is, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity."

In this case the vendor's covenant was affirmative and positive, and in terms agreed to sell and convey the premises by a good and sufficient deed of conveyance, free and clear from all incumbrances. Under this covenant there can be no doubt but what the law implies a warranty on the part of the vendor that he possessed, at the time of making the same, a good and perfect title, and that he would convey the same to the vendee, upon the observance by her of the covenant on her part.

The legal proposition laid down in *Burwell v. Jackson* (*supra*), arose upon this state of facts: The vendors agreed to execute, or caused to be made and executed, to the vendee, on a day named, by a good and sufficient deed of conveyance, the lands mentioned in the agreement. The vendee was to pay a part of the purchase-money upon a particular day, when the deed was to be delivered. Prior to that time he had given his note to the vendors for a part of the purchase-money. At the time that the contract of sale was made, the premises were incumbered by a mortgage, which was afterwards foreclosed, and the title became vested in a stranger. In an action upon the note it was held that the sale and conveyance in the foreclosure proceedings put it out of the power of the vendors to convey any title to the purchaser, and authorized the vendee to treat the contract as rescinded; that as the title of the vendor was lost to him, the vendee was not bound to offer to perform on his

part, or to require a performance from his vendor, but might at once treat the contract as at an end; and the court further said that the vendee had an immediate cause as against the vendors to recover back the money paid.

*Lawrence v. Taylor* (5 Hill, 107) is also in point, which was an action by the vendee to recover back the purchase-money paid upon an executory contract for the sale of lands, wherein the vendor agreed to convey the premises by a deed containing a covenant of warranty. The vendee was allowed to recover the moneys paid in on the contract, on proving that the vendor had no title to a part of the lands, the court holding that it was sufficient to prove that there was no title or a defective one in the seller. The recent case of *James v. Burchell* (82 N. Y., 108) affirms the general propositions of law which have been stated. In that case the vendor agreed to sell and convey, or caused to be conveyed, the premises described in the executory agreement, and for the sum of \$14,000, and on the performance by the vendee of covenants on his part to deliver a deed containing a covenant of warranty and that the premises were free and clear from all incumbrances. At the time the contract was entered into the vendor was the owner of the premises in fee, and on the same day he conveyed the land to a third party. The vendee failed to perform any part of his agreement, and the action was brought against him upon the contract to recover damages for his non-performance, and it was held that the vendor, by such conveyance, violated the contract, and the defendant was thereby released from any liability under it. (See, also, *Judson v. Wass*, 11 Johns., 525; *Higgins v. The D. L. and W. R. Co.*, 64 N. Y., 553; *Eddy v. Davis*, 23 Week. Digest, 468; *Buttrick v. Holden*, 8 Cush., 233.)

There is a class of cases which hold that where the vendee is in default, and has failed to perform the contract according to its terms, the vendor may sell the premises and the vendee cannot recover back the purchase-money, but they have no application to the case in hand, for the reason that the plaintiff was not in default at the time the defendant conveyed the premises to Hill. (*Battle v. The Rochester City Bank*, 5 Barb., 414; *Ketchum v. Everston*, 13 Johns., 359; *Green v. Green*, 9 Cow., 46.)

These cases are placed upon the ground that the vendee had

refused to proceed to the ultimate conclusion of his agreement, and the vendor being ready and willing to perform and fulfill all his stipulations according to the contract, the latter was under no obligations, legal or equitable, to return the money which he had received under the contract of sale.

It was not necessary for the plaintiff to offer to pay the balance of the purchase-money and to demand a deed of the premises, for the reason that the latter, by conveying the premises to another, had put it out of his power to perform the agreement on his part. (*Buttrick v. Holden*, 8 Cushing, 233; *Newcomb v. Brackett*, 16 Mass., 161.) Nor does the fact that Hill knew of the contract between these parties, at the time he took a deed, change the rule, although the plaintiff might have enforced a specific performance of the contract against him and compelled a conveyance. (*James v. Burchell*, 82 N. Y., 113.)

The position of the defendant that the plaintiff cannot recover in this action for the reason that she remains in possession of the premises, does not seem to be well taken upon the evidence and facts and circumstances of the case. At the time of the conveyance to Hill the plaintiff was in possession of the premises through and by her tenant, but the evidence tends to show, and would justify a conclusion, that the tenant had attorned to Hill; when this action was commenced, he claiming the right to receive, and did receive, the rents which fell due after he received the deed. Hill testified, and the defendant did not seek to contradict his testimony, that he had received the rents from the tenant, and that he had possession of the property since the date of his deed. In support of the judgment we are to assume that the referee found that the plaintiff had ceased to have any control over the premises, and that the tenant had attorned to Hill who had acquired possession of the property.

It is unnecessary to refer to a class of cases where the vendor, by the terms of his agreement, agreed to acquire in the future the title to lands and to convey them on a particular day to the vendee, as the principle involved in such cases is not applicable to the question involved in this controversy. Under such an agreement the vendee necessarily relies upon the personal covenants of the vendor, and the nature of the agreement excludes the idea that the vendor had a present title to the property which is made the subject of the sale.

I think the judgment should be affirmed upon the ground that the defendant, by conveying the fee of the land to Hill, terminated the agreement, and as the plaintiff had up to that time in all respects performed the agreement on her part she was at liberty to regard the contract as at an end, and in law and equity she was entitled to repayment of the moneys which she had advanced on the agreement.

Judgment should be affirmed, with costs.

HAIGHT, J., concurred; SMITH, P. J., and BRADLEY, J., not sitting.

Judgment affirmed.

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JAMES SILVEY, PLAINTIFF, v. WILLIAM W. LINDSAY  
AND OTHERS, DEFENDANTS.

*Residence — when acquired by an inmate of the Soldiers and Sailors' Home at Bath.*

In 1880 the plaintiff, a discharged soldier, who was then a resident of the city of New York, was admitted as an inmate into the institution known as the "New York State Soldiers and Sailors' Home," located in the town of Bath. He was not a pensioner under the laws of the United States, and was supported at the home wholly at public expense. In becoming an inmate of the institution he intended to change his residence from the city of New York to the town of Bath, and to make his residence in said institution so long as he should be permitted to remain there as an inmate.

*Held*, that he acquired a residence in the town of Bath which authorized him to vote at an annual town meeting held in that town.

*Quære*, as to whether the Soldiers and Sailors' Home was an "asylum" within the meaning of that term, as used in section 8 of article 2 of the Constitution, which declares that "for the purpose of voting no person shall be deemed to have gained or lost a residence, by reason of his presence or absence \* \* \* while a student of any seminary of learning, nor while kept at any alms-house or other asylum at public expense."

CASE submitted under an agreed state of facts, under section 1279 of the Code.

In 1886, the plaintiff was an inmate of the "New York State Soldiers and Sailors' Home," located in the town of Bath, in the county of Steuben, organized and maintained under the provisions of chapter 48 of the Laws of 1878. The defendants were justices of the peace of said town and presided at the annual town meeting held for that year. The plaintiff, claiming to be a resident of the

town, offered his vote to the town officers, which was rejected by the defendants, upon the sole ground that he was not a resident of the town. The case states that the defendants willfully and maliciously refused to receive the plaintiff's vote, with full knowledge of all the facts set forth in the case bearing upon the plaintiff's right to vote. It was stipulated that if it should be held by the court that the plaintiff was a qualified voter at that election then the plaintiff's damages were fifty dollars, for which sum he was entitled to judgment.

*Miller & Nichols*, for the plaintiff.

*J. F. Parkhurst*, for the defendants.

BARKER, J.:

The legal question submitted for our determination is stated in the case as follows: Did James Silvey gain a residence in the town of Bath, so as to entitle him to vote at a town meeting, by reason of his presence as an inmate of said institution?

The admitted facts upon which the plaintiff based his right to vote as a qualified elector of the town of Bath, are that he was a soldier in the service of the United States during the late rebellion and was entitled to admission as an inmate into the institution known as the "New York State Soldiers and Sailors' Home," located in the town of Bath, as provided in chapter 48 of the Laws of 1878, and the rules and regulations adopted by the board of trustees having the control of the said institution. At the time he became an inmate of the home, in the year 1880, he was a resident of the city of New York, where he was a qualified elector. Since he became an inmate of the asylum he has resided therein continuously, and during all that time voted at every State election and town meeting held in the town of Bath up to the time his vote was rejected by the defendants. It does not appear from the case that the plaintiff was ever married, or that he was at any time a householder, or engaged or interested in any business. He was not a pensioner under the laws of the United States, and was supported at the home wholly at public expense. As to his intention to change his place of residence from the city of New York to the town of Bath, the fact is stated in the case in these words: "In

becoming an inmate of said institution, said Silvey intended to change his residence from the city of New York to the fifth election district of the town of Bath, and to make his residence in said institution so long as he should be permitted to remain there as such inmate." At the polls, and upon oath, he stated to the defendants, as follows: "I reside in the town of Bath, for the reason that I was admitted an inmate of the New York Soldiers and Sailors' Home, in this town, by the authorities thereof, in the year 1830, and have remained such inmate from that time to the present, with the intention, at all times, of making my residence in said institution, so long as I shall be permitted to remain such inmate. At the time of my admission to said institution I was an honorably discharged soldier of the United States, and a resident and voter of the city of New York. I therefore answer that I am a resident of the town of Bath. Inbecoming an inmate of said instituticr, I intended to change my residence from the city of New York to the fifth election district of the town of Bath." It was stipulated that every statement of fact made by the plaintiff, as contained in his evidence, was true.

It thus appears that the plaintiff, on entering the institution, abandoned his residence in the city of New York, and intended to make the town of Bath his future residence, permanently or for an indefinite period of time. He thus became a resident of the latter place, and a qualified elector therein, unless by reason of some positive law, constitutional or statutory, he was disqualified from becoming a resident of that town, by reason of being an inmate in that institution, maintained at public expense. He voluntarily, for the purpose of securing to himself more of the comforts of life, accepted the benefactions gratuitously offered by the State to discharged soldiers in need of a home, in consequence of physical disability or other cause. Thereafter that institution was his house, his home, his fireside, his bed, his board. He had no family with which to reside or support, and had no business relations elsewhere. Nothing remained with which he was connected in the least degree in the city of New York indicating that he remained a resident there.

The qualification of voters at all general elections held in the State are defined by the Constitution, as follows: "Every male



citizen of the age of twenty-one years, who shall have been a citizen for ten days and an inhabitant of this State one year next preceding an election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere." (Article 2, § 1.) To become a legal voter at the town meeting, the same qualifications are required, and none other. (R. S. [7th ed.], 808, § 1.)

The only restraint or regulation placed upon a citizen in changing his place of residence from one place to another, within the State, is contained in article 2, section 3 of the Constitution, which declares: "For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any alms-house, or other asylum, at public expense; nor while confined in any public prison."

The defendants contend that while the plaintiff was an inmate of the Soldiers and Sailors' Home, and supported at public expense, he was prohibited from acquiring and could not gain a residence in the town of Bath. It may be conceded, in disposing of this case, that this institution is an asylum of the class and character of those referred to in this paragraph of the Constitution. But we do not hold that it is, and many reasons may be given why it should not be so considered.

A student in college, a soldier in the United States service and a voluntary inmate of a charitable institution, the recipient of a public gratuity, may change his place of residence like any other citizen, by doing those things which the laws requires of all persons who intend to change their residence from one place to another within the State. The clause of the Constitution quoted contains no prohibitory provisions.

It simply declares that for the purpose of voting no person shall be deemed to have gained a residence by reason of his presence in a particular place, while a student of any seminary of learning or in

the other cases mentioned therein. But a person who is a student in a college may change his residence from place to place while in attendance upon the college just the same as any other citizen. These views have been maintained and expressed by the law department of the State relative to the status of the inmates of this institution and their qualifications as voters in the town of Bath.

The defendants also contend that as the plaintiff only intended to reside in the town of Bath so long as he should remain an inmate in the soldier's home, he could not gain a residence by the rules of the common law. As he intended to abandon his former place of residence he could acquire one in the town of Bath if his purpose was to remain there for a period of time, although indefinite as to its duration. He was a citizen of the State, under no disqualifications prohibiting him from becoming a resident of any place which he might determine upon. It was not necessary that he should have had the fixed purpose of residing permanently in the town of Bath. A citizen of the State must, of necessity, have at all times a place of residence therein. It may be for a long or short period of time in any particular place. For the purpose of securing the right to vote in any particular town his residence therein must be for the length of time required by the election law. But he becomes a resident of the place the instant he arrives within the limits of a town with the intention of making it his future home and residence permanently or for an indefinite length of time. A place of residence in the common law acceptance of the term means a fixed and permanent abode and dwelling place for the time being as contradistinguished from mere temporal local residence. The fact is admitted that the plaintiff had determined to remain in the town of Bath for an indefinite time. By the American authorities a residence may be acquired in a particular place where it is the intention of the person to remain therein for an indefinite period of time. It is not necessary that he should have the purpose to remain there permanently, that is to say, never to remove therefrom. There must be both the fact of the abode and the intention of remaining indefinitely to constitute a domicile or a residence. (*Hegeman v. Fox*, 31 Barb., 475; *In the Matter of Wrigley*, 8 Wend., 141; *Chaine v. Wilson*, 1 Bos., 673; *Dupuy v. Wurtz*, 53 N. Y., 556.)

In Massachusetts the courts have repeatedly held that where there

is an intention on the part of a citizen of that State to abandon his then present place of residence, and then remove to another town with an intention to remain there for an indefinite length of time, he becomes a resident of the latter place. (*Commonwealth v. Cushing*, 99 Mass., 592; *Whitney v. Sherborn*, 12 Allen, 111; *Mead v. Roxborough*, 11 Cush., 362; *Carnoe v. Freetown*, 9 Gray, 357; *Harvard College v. Gore*, 5 Pick., 379.) Webster defines a resident to be one who resides or dwells in a place for some time, and a residence as being the place where one resides; an abode; a dwelling; a habitation.

It is clear to my mind that the plaintiff was, within the sense and meaning of the election laws, a resident of the town of Bath. He had no residence elsewhere. It is not to be supposed that the legislature intended to deprive the inmates of that institution of any of the privileges of citizenship. A person may be an inmate of that institution and maintain his residence elsewhere, and I suppose there are many such instances. A person may become an inmate of this institution with an expectation on his part to remain, as long as his wants and means require, and have a family and a residence elsewhere.

The plaintiff is entitled to a judgment for fifty dollars damages, with costs, as agreed upon in the case submitted.

SMITH, P. J., HAIGHT and BRADLEY, JJ., concurred.

Judgment ordered for the plaintiff for fifty dollars damages, with costs.

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THE THIRD NATIONAL BANK OF BUFFALO, PLAINTIFF, v. ITTAI J. ELLIOTT, AS SHERIFF OF ALLEGANY COUNTY, DEFENDANT.

42h 121  
82 AD\* 50

*Levy upon property under an attachment — right of the sheriff to deny the defendant's title to the property in an action for a false return brought by the plaintiff in the attachment suit — when a sale of the property of an insolvent company will be held void.*

In an action, brought against the Gibbs & Sterritt Manufacturing Company, an attachment was issued and delivered to a deputy sheriff, who, at the request of the plaintiff's attorney, seized and levied upon certain property

which had, prior to that time, been levied upon by the sheriff under attachments issued in other actions brought against the firm of Humphrey & Aspinwal. The deputy thereafter made the customary inventory and filed a return in the clerk's office. Thereafter, under executions issued upon judgments recovered in the aforesaid actions brought against the firm of Humphrey & Aspinwal, and an execution issued upon a judgment subsequently recovered by the plaintiff in his action against the Gibbs & Sterritt Manufacturing Company, the sheriff sold the property attached, as directed in the executions, and applied the proceeds upon the judgments recovered against the firm of Humphrey & Aspinwal, returning the plaintiff's execution *nulla bona*.

Upon the trial of this action, brought by the plaintiff to recover the moneys which he alleged the defendant, as sheriff, had collected on its execution, it appeared that the property was, prior to November 14, 1832, owned by the said manufacturing company, and in the possession of the said firm, as its agents for selling its goods, each of the partners being a trustee of the company; that on that day the property was sold to the said firm, and remained thereafter in its possession until levied upon by the sheriff.

*Held*, that the fact that the deputy sheriff had seized certain items of property, as property owned by the defendant in the attachment suit, and had made and filed a return, did not estop the sheriff from showing, when sued for making a false return, that the property attached belonged to a third person; that it did, however, cast upon him the burden of proving that the property did not belong to the defendant.

That in this case the sheriff had failed to establish the fact that the property did not belong to the Gibbs & Sterritt Manufacturing Company; that the court properly held the sale of November 14, 1832, to be void as a matter of law, as it was shown that the sale was made at a time when the company was insolvent, by the members of its executive committee to two of its own trustees, who had knowledge of the insolvency of the company, and received the property in payment of a debt much less in amount than the value of the property.

MOTION by the defendant for a new trial, founded upon a case containing exceptions, ordered at the Allegany Circuit to be heard at the General Term in the first instance.

The action was brought to recover moneys which the plaintiff in its complaint alleges that the defendant, as sheriff, collected on an execution in its favor against the Gibbs & Sterritt Manufacturing Company. The execution was returned *nulla bona* by the sheriff and filed in the proper clerk's office. Several attachments against the property of Humphrey & Aspinwal were delivered to the defendant, as sheriff, and he seized thereon certain items of personal property, taking an inventory of the same and making and filing the customary return. Thereafter the plaintiff procured an attachment against the property of the Gibbs & Sterritt Manufacturing Company and

delivered it to one of the defendant's deputies, who, at the request of its attorney, did seize and levy upon a portion of its property which the sheriff had theretofore levied upon, as the property of Humphrey & Aspinwal, and the deputy made the customary inventory and filed a return to the attachment in the proper clerk's office. In the actions against Humphrey & Aspinwal judgments were entered and executions were issued thereon, and on one of them, in favor of the Bank of Randolph, as early as the 7th day of May, 1883, for the sum of \$10,680.49, and other executions, in amount greater than the value of the property attached, were delivered to the sheriff before the 25th day of June, 1883. On the 23d June, 1883, this plaintiff recovered a judgment in its suit against the Sterritt & Gibbs Manufacturing Company for the sum of \$7,933.60, and on the 25th day of June, 1883, issued an execution thereon and delivered it to this defendant, as sheriff, with the customary directions, to satisfy the same out of the property attached, by virtue of the warrant attached. On the 5th day of July following the sheriff sold all the property attached, on the executions issued upon the judgments against Humphrey & Aspinwal, and the sum realized was less than the aggregate amount of such judgments, and thereupon returned the execution on the plaintiff's judgment against the manufacturing company *nulla bona*. The items of property levied upon, by virtue of the attachments in the plaintiff's favor, sold for the sum of \$3,159.69, for which amount, with \$235.35 interest, the court directed a verdict in the plaintiff's favor. The property, prior to the 14th day of November, 1882, was owned by the said manufacturing company, on which day, by an assignment in writing in due form, it sold all its interest in the same to Humphrey & Aspinwal, in whose possession the same was at the time of the sale, and it remained in their possession up to the time that the same was seized by the sheriff on attachments issued against them. At the close of all the evidence the defendant requested to go to the jury, upon all the facts of the case, claiming that the title to the property was in Humphrey & Aspinwal, and that the avails of the sale were properly applied upon the execution against those parties. This request was denied, and the defendant excepted. The court thereupon directed a verdict in the plaintiff's favor, to which the defendant also excepted.

*Lewis & Moot*, for the plaintiff.

*Henderson & Wentworth*, for the defendant.

BARKER, J.:

The sheriff sought on the trial to prove the truth of his return *nulla bona*, to the execution issued on the judgment in the plaintiff's favor, by attempting to prove that the property levied upon under the attachment in the plaintiff's favor, against the Gibbs & Sterritt Manufacturing Company, was not the property of that company liable to be seized upon attachment or execution against it, but that it was, in fact, the property of Humphrey & Aspinwal, the defendants named in the several attachments and executions which he had received prior, in point of time, to the attachment which he received from the plaintiff against the said manufacturing company. The execution issued upon the plaintiff's judgment is in strict compliance with the provisions of section 703, Code of Civil Procedure, and properly contains a specific direction requiring the sheriff to satisfy the judgment out of the personal property of the judgment-debtor, which he had theretofore attached by virtue of a warrant of attachment issued in such action. The sheriff was not authorized, by virtue of this process, to levy upon and sell any other property claimed to be owned by the judgment-debtor. If the property attached under the attachment issued in the plaintiff's action was not the property of the defendant therein, then the plaintiff has not suffered any damage by reason of the failure of the sheriff to sell and convert such property into money, to be applied upon the plaintiff's judgment, and the sheriff's return *nulla bona* was not false, but true, and constituted a perfect defense. The plaintiff's position is not a tenable one. His contention is this, that as the sheriff seized certain items of property as property owned by the defendant in the attachment suit, and had made and filed a return in due form of law, stating therein that he had attached the property, and an inventory had been taken thereof as the property of the defendant, the return is, in this action, conclusive evidence against the sheriff, and he is estopped from setting up title to the property in a third person. In support of his argument, the learned counsel for the plaintiff cites the familiar rule that as against the sheriff, and those claiming

in privity with him, his return is conclusive as to his own acts, stated therein, and the same is conclusive evidence in favor of parties who claim an interest or right under the return, and that the sheriff and his deputies are precluded from contradicting it. (*Sheldon v. Payne*, 7 N. Y., 453; *Armstrong v. Garrow*, 6 Cow., 465.) This rule of evidence is not as broad in its application as claimed by the counsel for the plaintiff.

It has its limitations, and applies only to the acts of the officer, which he, in his return, states he has done and performed in his official capacity. So far as the return before us states that the sheriff had levied on certain articles of personal property, under and in pursuance of the process in his hands and upon which the return was indorsed, the same is conclusive, as evidence in this action, and he is estopped from denying that he did those things. His own acts, to which he refers and makes a statement are confined to the seizure of the property mentioned, and that the same was done in pursuance of the process. But, upon the question now litigated, as to who is the owner of the property seized, the return was not conclusive evidence in the plaintiff's favor that the defendant in the attachment suit was the owner. When an officer makes return to a process placed in his hands and files the same in the proper clerk's office, it becomes a record of the mode and manner in which such process was executed by the officer, and so long as it remains of record it is conclusive upon the officer as to his own acts under and by virtue of the process. The sheriff can always defend his return *nulla bona* to an execution placed in his hands, by proving the fact that the defendant, in the execution, has no property out of which the same could be made. If he levies on property, as the property of the defendant, and then makes a return of no goods found, then, in an action by the plaintiff for making a false return the burden of proof is cast upon him, and he must establish, as a matter of fact, that the property levied upon was not the property of the defendant, thus maintaining the truth of his return. If the defendant in the execution is not the owner of the property seized, and such property has been levied upon by mistake on the part of the sheriff, he becomes liable to the true owner for all damages he has sustained, and it would be a harsh and unjust law which would hold the sheriff liable to the plaintiff for the value of

the property levied upon in addition to his liability to the true owner. In this case the sheriff having, by his deputy, seized property as belonging to the defendant, by virtue of the attachment, the burden of proof was cast upon him to establish that such property did not belong to the defendant. (*Magne v. Seymour*, 5 Wend., 309.) He may justify a return *nulla bona* to an execution issued upon a judgment after he has levied on the property under the preliminary process of attachment, issued in the action before judgment. This precise question was up and directly passed upon in *Zummis v. Kasson* (43 Barb., 373), where all the essential facts of the case are parallel to those in this case. The question received a most careful consideration by Mr. Justice SMITH, whose opinion was concurred in by both of his learned associates and has been followed in subsequent cases. (*Dolson v. Saxton*, 11 Hun, 565; *Cromwell v. Gallup*, 17 id., 61.)

In *Paige v. Willet* (38 N. Y., 28), it is held that after levy under an execution the sheriff may prove, as a defense in an action for making a false return, that the goods levied upon were exempt from levy and sale under the statute. (See, also, *Wehle v. Connor*, 69 N. Y., 546.) Therefore, if the evidence tended to prove that the property, at the time it was attached, was owned by Humphrey & Aspinwal, the order of the trial judge, directing a verdict in the plaintiff's favor, cannot be upheld.

As has been already said, the plaintiff made out a *prima facie* case, and the sheriff, to defeat a recovery, attempted to prove that the title to the property was in Humphrey & Aspinwal. If, upon the undisputed facts, their title to the property fails, then the defense must fail. The sheriff has allied himself with their title and sets it up as a justification of his return of *nulla bona*. As the legal questions involved are the same as if the plaintiff's attachment had been delivered to the sheriff before he had made a levy upon the property by virtue of the attachments then in his hands, it is like a case where the sheriff has in his hands several attachments against different parties, and the plaintiff in one of the attachments points out to the sheriff property and requires him to seize it as the property of the defendant in his attachment, and the plaintiff in the other attachment directs him to seize it as the property of the defendant in his action. The sheriff, in such a case, must act at his peril.



The Gibbs & Sterritt Manufacturing Company was a Pennsylvania corporation. The powers conferred upon it by the laws of that State and the mode and manner in which they should be exercised were not disclosed upon the trial. It was doing an extensive business in the manufacture of goods and machinery and by one of its by-laws, the president, vice president, secretary and treasurer constituted the executive committee, and they, or a majority of them, were authorized to conduct the current business of the company. Humphrey & Aspinwal, were merchants doing business in the county of Allegany, in this State, and were the duly appointed agents of the company for the sale of their goods in that locality. Both of them were trustees of the corporation. In November, 1882, they had in their possession, as such agents and for sale, the goods mentioned and other property of the same character of the then estimated value of about \$40,000. They were to receive a commission on sales made and it was the course of business adopted for them to remit to the company the cash proceeds of sales made, and to forward all notes and other paper received in lieu of cash, keeping an account on their own books of all business transactions. At this time, Humphrey & Aspinwal claimed that they had made certain advances to the company in a sum not definitely ascertained, but there was no claim made that it would exceed the sum of \$900. Their commissions were not fully ascertained at that time, but it was admitted that they had in their hands, belonging to their principal, moneys equal to, if not in excess of all, unpaid commissions. At the time of the sale and transfer of the property by the company to Humphrey & Aspinwal, the former was in a condition of great financial embarrassment, a fact well known to the executive officers of the company and also to Humphrey & Aspinwal. On the day the bill of sale was made out there was a meeting of the board of trustees which was attended by Humphrey & Aspinwal, and all the members of the executive committee. At that meeting a motion was made by Mr. Aspinwal, that the executive committee notify the creditors of the company to meet them, on the thirtieth of that month, for the purpose of considering the financial condition of the company and the same was carried. Early in December proceedings were instituted in the courts of the State of Pennsylvania for the purpose of having the company declared insolvent and to wind up its affairs.

After considering all the evidence with attention, we are of the opinion that, at the time of the sale to Humphrey & Aspinwal, the company was insolvent, and that the fact was well known to them. Mr. Aspinwal was called as a witness by the defendant and seems to admit, without hesitation, that he knew of the financial condition of the company, and that his firm paid nothing to the company at the time of the sale and transfer of the property to them. It was conceded on the trial that the value of the property was at least \$15,000. The bill of sale was executed by the president and treasurer, to which was attached the corporate seal of the company and was witnessed by its secretary, and that instrument recites that the consideration upon which the transfer was made was "the partial payment of company's indebtedness, and the sum of one dollar to it in hand paid at and before the delivery of the contract." The instrument contained a covenant in these words: "And the Gibbs & Sterritt Manufacturing Company do hereby covenant to, and with the parties of the second part, that it is the owner and has the right to sell and transfer the said property, and that the same is free and clear of all incumbrances and liens, and it hereby covenants to forever warrant and defend the sale hereby made."

Nothing was proved upon the trial tending to show, nor was it claimed by the defendants, that this instrument was intended as a mere security for any indebtedness which the company might owe the purchasers, or that, as between the parties, it was not intended to pass an absolute and indefeasible title to the property. In the face of the fact that the company was insolvent, and that the sale was made by the executive committee to two of the trustees of the company, we think that the transaction was correctly held to be void, as a matter of law, as against the creditors of the corporation. Conceding that it was intended to discharge a *bona fide* indebtedness of \$900, owing by the purchasers to the company, it was, nevertheless, enormously below its actual value. The law pronounces the action of the executive committee as fraudulent and void, and no question was made for the consideration of the jury. While the corporation remained solvent and able to go on with its business in the usual and customary way, the trustees held the property in trust for the benefit of the shareholders. The instant the company became insolvent and unable to pay its debts the trustees

then held the property in trust primarily for its creditors, and they were without power to deal with the property between themselves for the purpose of paying off their own indebtedness against the company in preference to and in exclusion of other creditors. As trustees, holding the property in trust, they could not sell the property to themselves or any one of their number. The fact that the trustees were dealing with themselves concerning trust property, made the transaction fraudulent in law and void as against the creditors of the company. It would be in vain for Humphrey & Aspinwal, on the evidence, to attempt to sustain the transaction in a court of justice. The defendant is not in a situation, in this litigation with the plaintiff, to make any better title than they could. (*Koehler v. Iron Company*, 2 Black, 715; *Drury v. Cross*, 7 Wall., 299; *Hoyle v. Railroad Company*, 54 N. Y., 314; *Cumberland Coal Co. v. Sherman*, 30 Barb., 553; *Cook v. Berlin Woolen Mills*, 43 Wis., 433; *Corbett v. Woodward*, 5 Saw. C. C. Rep., 403; 22 Central Law Jour., 199; *Bennett v. Austin*, 81 N. Y., 308.)

The right of the plaintiff to a verdict in this case depended upon the fact alleged by the plaintiff, that the return to the execution was false. The form of the action as set forth in the complaint was for not paying over certain moneys alleged to have been collected by the sheriff upon the execution. But we think there was not such a variance between the proofs and the pleadings as to require this court to set aside the verdict, as the question of fact litigated was the one upon which the ultimate rights of the parties must depend.

The defendant took several exceptions to the reception of evidence given on the trial by the plaintiff. Such evidence was not necessary for the purpose of making out a *prima facie* case against the defendant, nor was it received until after the defendant had rested. As the defendant's proof failed to make out a case meeting the plaintiff's *prima facie* case, so as to require the evidence to be submitted to the consideration of the jury, he is not entitled to a new trial, although some of the evidence received over the defendant's objection was not competent. As the case was left to stand at the close of the proof he was without any defense.

It is unnecessary to make any reference to the assignment which Humphrey & Aspinwal made of the goods for the benefit of their creditors, for the defendant claims that that transaction was fraudu-

lent and void as against their creditors, and the plaintiff claims that they had no title whatever to transfer.

Motion for a new trial denied, and judgment ordered for the plaintiff upon the verdict.

SMITH, P. J., and BRADLEY, J., concurred; HAIGHT, J., not sitting.

Motion for new trial denied, and judgment ordered for the plaintiff on the verdict.

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GEORGE BELLMAN, APPELLANT, v. THE NEW YORK  
CENTRAL AND HUDSON RIVER RAILROAD COM-  
PANY, RESPONDENT.

*Liability of a railroad for injuries to a passenger — when it is responsible for injuries  
resulting from acts done under the direction of its conductor.*

A military organization, whose headquarters were at Rochester, having agreed to give a public entertainment at the village of Brockport, one of its members engaged of the defendant, a railroad company, passage for all the members from Rochester to Brockport and return. The members were carried to Brockport in a separate car, which was, after they had left it, run upon a side track, to the west of and beyond the station grounds, so that the west end of the car rested upon a bridge upon which the railroad crossed, at a height of twelve feet, a village street. Before ten o'clock in the evening the car was lighted and the doors unlocked, although no person representing the company was left in charge of it. The car could be seen from the hotel where the members of the organization were staying.

At about the time at which the freight train to which this car was to be attached was due at Brockport, most of the members of the organization, including the plaintiff, had passed from the platform of the station, across and along the tracks, and had taken their seats in the car. After the freight train had arrived and stopped, its conductor opened the door of the car and said: "Boys come out and give us a shove; shove this car on to the main track so I can hitch on." The plaintiff, with others, arose, went to the door, and seeing the freight train moving on his right-hand side, and fearing to alight on that side, stepped off the steps on the other side and fell through or over the side of the bridge to the street below.

Upon the trial of this action, brought by the plaintiff to recover damages for the injuries so sustained, the plaintiff recovered a verdict, which was, on motion, set aside for the reason that when the plaintiff boarded the car it was outside

of the station grounds, and there was not sufficient evidence to justify the jury in finding an agreement or consent by the railroad company that the plaintiff might occupy the car in the place where he found it.

*Held*, error; that the plaintiff's right to recover did not depend upon these facts, but that the question was whether at the time he received the injury the conductor had taken charge of the car and the plaintiff, as a passenger, had placed himself under his care.

APPEAL from an order of the Monroe Special Term, granting the defendant's motion for a new trial on a case containing exceptions. The action was tried at the Monroe Circuit, and the plaintiff recovered a verdict of \$2,000.

*Raines Bros.*, for the appellant.

*Edward Harris*, for the respondent.

BARKER, J.:

The plaintiff, in alighting from one of the defendant's passenger cars, fell through the openings in a bridge over a highway, upon which the car was standing, and received severe injuries to his person. He claims that at the time he was a passenger on the defendant's road and rightfully in the car, and that the injuries which he received were caused by the negligence and carelessness of the conductor in charge of the car. The evidence bearing on the questions of fact, which the plaintiff was required under the pleadings to maintain, is undisputed. If from the proofs the jury were justified in reaching the conclusion that the conductor was guilty of negligence which caused the accident, and the plaintiff himself was not guilty of contributory negligence, then I think the verdict should be sustained, as I am unable to discover any error in the rulings of the learned trial judge, of which the defendant has reason to complain.

The facts may be briefly stated. The village of Brockport is about twenty miles west of Rochester, and the line of the defendant's road passes through both places. The plaintiff resides in Rochester, and is a member of a military organization, whose headquarters were in that city, where most of the other members also reside. This company had arranged to give a public entertainment in Brockport. Their numbers were sufficient to fill one ordinary passenger car. One of the members, Mr. Yost, acting as committee-

man for all, engaged of the defendant passage for all the members of the company, from Rochester to Brockport and return. The fare paid was the regular fare for each member of the company, and before leaving Rochester the same was paid and a return ticket was delivered to Mr. Yost for each member of the company, including the plaintiff. A car was assigned by the company, in which they were carried to Brockport in the forenoon of the day on which the exhibition was to be given. On arriving in Brockport the car was detached from the train and run upon a switch. After the exhibition was over the members of the company were carried back to Rochester in the same car, which was attached to a passing freight train which left Brockport after midnight. At the latter place there is a depot with the usual safe and convenient accommodations, with waiting-rooms for passengers, and is located about 230 feet east of Main street, over which the railroad crosses on a bridge, some twelve feet high. In front of the depot the main track passes, some twelve feet from the platform. To the south of the main track, and seven feet therefrom, there is a side track which crosses the bridge west of the depot and intersects with the main track. In the morning, after the members of the company left the car, it was switched upon the side track and run to the west of the depot, so that the west end of the car, for some three or four feet of its length, rested upon the trestle of the bridge. There were openings in the bridge at or near the end of the car, and no guards in that section of the south side of the bridge, and the outer space of the car was very near, if it did not overlap, the side of the bridge. The members of the company were guests at a hotel on Main street, north of the bridge and near the depot, and the exhibition was given by them in a room in the village south of the bridge and the railroad tracks. As early as ten o'clock in the evening the car was lighted and the doors unlocked, without any person on the part of the railroad company being present and in charge of the same. The depot building was lighted, the waiting-rooms opened, and the telegraph office was open and the operator present. It was arranged by the railroad company that the military company should return to Rochester that evening in the same passenger car, attached to a freight train, which passed Brockport soon after the exhibition was over. The car could be seen, and that it was lighted could

also be observed by persons passing along the street and under the bridge, as well as from the hotel where the plaintiff and his companions were guests. On their way to the hotel, and while there, the plaintiff and others observed the location of the car, and that it was lighted. About the time the train was due, most of the members, if not all of the company, including the plaintiff, passed from the hotel on to the platform of the depot and across and up the tracks to the car, and took seats therein. The train was an hour late in arriving at the depot, and stopped in front of the same, so that the rear car was about opposite of the place where the passenger car stood. At this time the plaintiff was seated near the west end of the passenger car. The conductor of the freight train came to the west end of the passenger car, which rested upon the bridge, opened the door and said, so as to be heard by the plaintiff and others: "Boys, come out and give us a shove; shove this car on to the main track, so I can hitch on." The plaintiff immediately arose from his seat and went to the door and, as he testified, saw the freight train moving on his right hand side, and fearing he might be hurt if he got off on that side of the car, he stepped down the steps on the other side, and, as he stepped off, he went through or over the side of the bridge, and fell a distance of some twelve feet. The car was moved to the switch and attached to the train.

On the question whether the plaintiff and his companions were permitted by the defendant to occupy the car, while it stood upon the switch before the arrival of the freight train, Mr. Yost, the committeeman for the company, testified as follows: "That when I contracted for the transportation it was arranged that the car was to lay there (at Brockport) for us and as soon as we were ready to move we were to take the car; Smith (the agent for the company) said, if I remember right, that the car was at our service, and he would telegraph to the baggageman, or whoever had charge of the car there at Brockport, to hitch us unto the first train that would bring us back to Rochester; he said that there would be a man there who would tell us whenever we were ready to return, or we should report ourselves to the authority there; that he did notify the agent at the depot that they were ready to move."

The defendant did not give any evidence upon the trial, except as to the nature and extent of the plaintiff's injuries. I think,

from this evidence, the jury were justified in finding that the conductor was guilty of improper conduct and negligence which caused the plaintiff's injuries, and that he was free from any contributory negligence.

The evidence fairly established, and such was the opinion of the trial judge and he so instructed the jury, that the passenger car, as it stood upon the side track, was outside of the depot grounds. The legal questions presented will be examined as if such was the fact. In determining whether the verdict should stand or not, it may be assumed that the relation of carrier and passenger did not exist at the time the conductor came to the passenger car and took the control and management of the same. But the moment he ordered the car to be moved, I think it may be reasonably and fairly held, as matter of law, that the relation of carrier and passenger was resumed, as the company intended to carry the persons holding tickets back to Rochester in that car. The conductor made no request that the car be vacated by the passengers, and no objection was made to their remaining in their seats while the car was being moved so that it could be attached to the train.

The plaintiff became a passenger as soon as he came to the depot building for the purpose of being carried to his home in Rochester, for which place he had a ticket, and was entitled to the care and protection which the law requires carriers of persons to bestow upon their patrons. The question is not whether the plaintiff took a seat in the car with or without the consent of the defendant. But the inquiry is, whether, at the time he received his injury, the conductor had taken charge of the car, and the plaintiff, as a passenger, had placed himself under his care. If the plaintiff had received injuries while passing from the depot building to the car, or while in the car before the conductor assumed control of the car, a very different question would be presented.

The conductor in ordering the car to be moved acted as the agent of the railroad company, and the plaintiff did not terminate the relation of carrier and passenger by attempting to assist the conductor as requested. It was the duty of the conductor to know the condition of the place where he asked the passengers to alight, and if it was not safe and secure for them to do so, to inform them of the fact. The evidence tended to, if it did not conclusively estab-



lish, the defendant's negligence. It was clearly a question for the jury to say whether the plaintiff himself was guilty of any negligence or carelessness which contributed to the injuries which he received. He was invited by the defendant's agent to leave the car at the place where he did, and it cannot be said that his action was altogether voluntary. Passengers on board of cars are largely under the direction and control of the conductor, and it is his duty to exercise the greatest care and caution in providing for their safety. (*Hickey v. Railroad Company*, 14 Allen, 429; *Sweeny v. Railroad Company*, 10 id., 368; *Hulbert v. N. Y. C. R. Co.*, 40 N. Y., 145.)

An examination of the exceptions fails to disclose any error of which the defendant can complain. The learned trial judge granted a new trial, as appears by his opinion printed in the case, for the reason, that when the plaintiff boarded the car it was outside of the depot grounds, and there was not sufficient evidence to justify the jury in reaching the conclusion that there was an agreement or consent by the railroad company that the plaintiff might occupy the car in the place where he found it, and that the plaintiff took all the hazard of his conduct in occupying the car before he was invited to do so by the company. As already stated, I do not think the plaintiff's right of recovery is made to depend upon that question.

The order appealed from reversed and a new trial denied, with costs.

SMITH, P. J., HAIGHT and BRADLEY, JJ., concurred.

Order reversed and motion for new trial denied.

IN THE MATTER OF THE APPLICATION OF PETER B. LAIRD  
AND ROBERT W. LAIRD, CREDITORS OF ASHBEL H.  
ARNOLD, DECEASED, FOR THE SALE OF REAL ESTATE IN  
PAYMENT OF HIS DEBTS, RESPONDENTS, v. RUSSELL G.  
ARNOLD, AS ADMINISTRATOR, BELLE K. ARNOLD AND  
OTHERS, APPELLANTS.

*Proceedings for the sale of the real estate of a decedent to pay his debts — what allegations the petition should contain when made by a creditor — the cost of a tombstone is to be treated as part of the funeral expenses — costs cannot be allowed by the surrogate until the proceeds of the sale have been paid to the county treasurer.*

On February 16, 1880, these proceedings were instituted by the petitioners to procure an order for the sale of the real estate, owned by one Arnold at the time of his death, for the payment of the petitioners' claim, which was the price of a tombstone or monument sold by them to the administrator of Arnold, in his representative capacity, and erected in memory of the deceased.

*Held*, that as the petition was made by a creditor, and as it stated the facts required by chapter 460 of 1837, as amended by chapter 172 of 1848, and chapter 298 of 1847, it was sufficient; that it was not necessary to set forth therein the facts required by section 3 of chapter 6 of title 4 of part 2 of the Revised Statutes, as that section only applied when the proceedings were instituted by the executor or administrator of the estate.

That the administrator having purchased the monument in his representative capacity, the debt thus created should be regarded as part of the funeral expenses and a charge upon the estate of the decedent.

*Dalrymple v. Arnold* (21 Hun, 110); *Laird v. Arnold* (25 id., 4) followed.

The order made in this case directed that out of the proceeds of sale the petitioners should be allowed their costs and expenses, which were adjusted at \$209.88.

*Held*, that the surrogate had no power to consider and determine the question as to whether costs should be awarded to the petitioners, and to fix their amount, prior to the time of the deposit of the proceeds of the sale with the county treasurer and the making of the decree of distribution.

APPEAL from an order of the Surrogate's Court for the county of Livingston, directing the sale of the real estate owned by Ashbel H. Arnold at the time of his death for the payment of his debts.

The said order also provided that out of the avails of such sale the petitioners be allowed their costs and expenses of the proceeding, which were adjusted at \$209.88. The petitioners' claim amounted to \$443. It was the price of a tombstone or monument sold by

them to the administrator and erected in memory of the deceased. His estate was valued at from \$10,000 to \$15,000. He left him surviving two children, of which the administrator, Russell G. Arnold, is one. The administrator appeared and resisted the claim upon several grounds, one being this: that he did not purchase the monument in his representative character, and that the same was not to be paid for out of the assets of the estate. At the request of the contestants two of the questions put in issue by their answers were ordered to be tried before a jury of the county of Livingston, which, by its verdict, found that the petitioners did sell to the administrator, in his representative capacity, a monument, and erected the same in memory of the deceased, and that the price agreed upon was \$442, to be paid for when erected. These proceedings were commenced by the filing of the petition on the 16th day of February, 1880.

From the order as entered the administrator and the other contestants appeal.

*Daggett & Norton*, for the appellants.

*Bingham & Joslyn*, for the respondents.

BARKER, J.:

The contestants object that the surrogate failed to acquire jurisdiction of the subject-matter because the petition is defective, for the reason it does not set forth the facts required by section 3, chapter 6, title 4 of the second part of the Revised Statutes. That section is applicable only when proceedings for the sale of the real estate of the decedent are instituted by the executor or administrator of his estate. When a creditor applies for a sale of the lands for the same purpose the creditor, in framing his petition, must comply with chapter 460, Laws of 1837, as the same was amended by chapter 172, Laws of 1843, and chapter 298 of the Laws of 1847 (3 R. S. [5th ed.], 196, § 59), which requires the petitioner to set forth in his petition that the executor or administrator has rendered an account to the surrogate and accounted for all the assets which came to his hands, and that the same are insufficient to pay the debts of the deceased. The petition avers all the facts necessary to be in full compliance with the requirements of the statute, and the

surrogate acquired jurisdiction over the proceedings. (*Wood v. McChesney*, 40 Barb., 417.)

The administrator having purchased the monument in his representative capacity, the debt thus created should be regarded as part of the funeral expenses and it becomes a charge on the estate of the decedent. That such was the character of the indebtedness has been heretofore determined by this court, and we adhere to the conclusions then reached. (*Dalrymple v. Arnold*, 21 Hun, 110; *Laird v. Arnold*, 25 Hun, 4.)

These decisions were made upon the authority of *Patterson v. Patterson* (59 N. Y., 574). In that case it was stated that the funeral expenses of a deceased person will not be treated as a debt against the estate, but as a charge upon the same, of the same nature and character as the necessary expenses of administration. After the controversy in that case was brought before the courts, and before a final decision was reached, chapter 267 of the Laws of 1874 was passed, which is decisive on the question in controversy. It is there declared that "the word debts" in said title (referring to tit. 4, chap. 6 of the second part of the Revised Statutes) "shall be construed as including funeral expenses, except that the charges for funeral expenses shall be a preferred debt, and be paid out of the proceeds of such sale before the general distribution to creditors shall be made." The provisions of the Revised Statutes referred to in this act gives to creditors the right to petition the Surrogate's Court for the sale of the real estate of a deceased person, for the payment of their debts. It will be observed that no distinction is made in the statute between debts created for funeral expenses and those created by the decedent in his lifetime. We, therefore, must hold, as the learned surrogate held, and for the reason stated in his written opinion, that the petitioners were entitled to an order directing a sale of the real estate for the purpose of paying the debt due the petitioners.

The cost of the monument or tombstone seems to have been reasonable in amount, in view of the value of the estate owned by the deceased, and the extent of his indebtedness at the time of his death. The fact that the administrator, who was one of the contestants, inherited one-half of the estate, and assented to the erection of the monument over the grave of his father, at a cost which met

his approval, is a further reason why we are of the opinion that the expense of the same was not unreasonable.

So much of the decree as purports to dispose of the question of the costs of the proceedings is not reviewable on this appeal. The expenses of the proceedings are to be paid out of the avails of the sale, whether the costs be taxed under the provisions of the Revised Statute or by the similar provision contained in the Code of Civil Procedure. All the avails of the sale must be brought into court and distributed under an order thereafter to be made. The question of costs is not up upon this appeal. (*In the Matter of John G. Lamberson*, 63 Barb., 297.)

The appellants have sought to present the point, that other proceedings for the sale of the real estate of the decedent, for the payment of his debts, having been commenced by other parties, and then pending, for these reasons insist that the application of these creditors should have been denied, as they had an opportunity to prove their debt in the proceedings pending when they filed their petition. It appears by the record, that upon the return of the order for the administrator to show cause, he, by his counsel, moved that the proceedings be dismissed, for the reason, as stated in the record, "that proceedings for the sale of the real estate of said deceased, for the payment of his debts, have been commenced by other parties, and are now pending, and therefore these proceedings should be dismissed, and the petitioners prove their debt, if they have any, in these proceedings." After a careful search through the records, I am unable to find any proof that other proceedings were pending of the nature and character of those mentioned. It does not anywhere appear that the surrogate ruled that such matter would not be a defense to these proceedings, if the fact existed. The allegation to that effect in the answer of the contestants should not be taken as true, although not denied by the petitioner by replying to the answer.

So much of the order as awards costs to the petitioner, and fixes the amount thereof, should be stricken therefrom, as the surrogate had no power to consider and determine that question prior to the depositing of the proceeds of the sale with the county treasurer and the making of the decree of distribution. (*In the Matter of Lamberson*, 63 Barb., 297; Code of Civ. Pro., § 2786, 2563, 3347, sub. 11.)

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FIFTH DEPARTMENT, OCTOBER TERM, 1886.

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*The Matter of Mace* (4 Redf., 325) is an authority for holding the question of costs is discretionary with the surrogate, and if allowed to the petitioner should be taxed under the provisions of the Code, although the petition was filed and the proceedings initiated prior to September 1, 1880. The order of modification should state specifically that the question of costs is reserved until the order of distribution.

The order as amended is affirmed, with cost of this appeal to be paid out of proceeds of sale.

SMITH, P. J., and BRADLEY, J., concurred; HAIGHT, J., not sitting.

Order modified by striking out the provision allowing and taxing costs to the petitioner as premature, and as so modified affirmed, with costs of this appeal to be paid out of the proceeds of the estate.

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ISAAC WILLETTS AND OTHERS, APPELLANTS, v. RUFUS M.  
BROWN AND OTHERS, RESPONDENTS.

*Lien on personal property — what agreement to give security will be enforced by courts of equity — who should be made defendants in an action to foreclose it.*

The plaintiffs, who were the owners of and had the right to operate and mine for oil on certain premises and to receive as a royalty the one-eighth of the oil produced on another parcel, after entering into possession of the first-named parcel and digging five oil wells thereon, which produced a considerable quantity of oil, entered into an agreement, under seal, by which they sold and transferred all their interest in the said property, and in the machinery, apparatus and the royalty before mentioned, to the defendant Kervin, who agreed to pay therefor the sum of \$32,000. Thereafter Kervin entered into possession of the premises and operated the wells, but neglected to pay the amount due to the plaintiffs. The contract contained a provision, immediately following Kervin's promise to pay the purchase-price, that "all rigs, tanks, boilers, engines, tubing and casing now upon said land, or hereafter put upon the same, shall remain upon the same, as part and parcel of the said premises, until all payments shall be made and completed herein;" and, also, the following provision: "It is further agreed, by and between the parties hereto, that in case of failure on the part of said Kervin to make the payments herein at the time they shall, respectively, fall due for the period of ten days, then, after such failure to meet such payment, all oil produced upon the said premises

shall thereafter be run into the lines to the credit of Isaac Willett (one of the plaintiffs) as a security for such payment."

*Held*, that as the vendors were owners of the fee of the lands, their interest in the wells, and all the machinery used in operating the same, must be regarded as personal property, as between the parties to this action, by force of chapter 372 of 1883.

That the plaintiffs had an equitable lien upon the property and the oil produced until the entire purchase-price was paid.

That, notwithstanding the omission from the agreement of any provision prescribing the form and manner in which the security was to be given, and regarding the contract as a mere executory promise to give a lien, such a promise would be regarded by courts of equity as creating an equitable lien which would be enforced, as against the party promising to give the lien and those who claimed under him, who were not innocent purchasers.

That the fact that the defendant Kervin had abandoned the premises, and that the plaintiffs had regained possession of the same and were engaged in operating the wells and receiving the product of oil and the avails thereof, did not prevent them from instituting this action to foreclose their lien, but furnished an additional reason for them to do so, as it would enable them to render an account whereby the amount of the unpaid purchase-money might be determined.

That one to whom the defendant Kervin had made a general assignment for the benefit of his creditors, and other persons claiming some interest in the property subsequent and subordinate to the lien of the plaintiff, were properly made parties defendant.

APPEAL from a judgment, entered in Allegany county, after a trial had before referee, dismissing the plaintiffs' complaint as to the defendants Rufus M. Brown, Robert M. Wall, Charles H. Levins and Samuel N. Reid, who are the respondents.

These defendants and Thomas Kervin appeared and answered, denying many of the material facts upon which the plaintiffs' cause of action is based, and setting up matters in defense, which, if true, would defeat a recovery as to all the defendants. The issues were all referred to a referee to hear and take proofs of the allegations in the complaint and to compute the amount due and owing on the contract described in the plaintiffs' complaint, and to report the same to the court. No case was made setting forth the proceedings on the hearing before the referee, but he states, in his report, that on motion of the counsel for all the defendants who answered, except Thomas Kervin, the plaintiffs' complaint was dismissed as to such defendants and each of them, on the ground that the same did not state facts sufficient to constitute a cause of action

against such defendants or either of them, with costs, which were taxed and entered in the judgment at \$143.77. No trial was had on issues between the plaintiffs and the defendant Kervin, and they remain untried. The case was submitted on printed brief.

*Hamilton Ward*, for the appellants.

*A. L. Elliott*, for the respondents.

BAKER, J. :

As the complaint was dismissed on the defendants' motion before any proofs were offered or any statement made of the facts which the plaintiffs intended to prove in support of his cause of action, it must be determined by the allegations contained in the complaint whether the same was properly dismissed, for it is to be presumed that the plaintiffs could sustain, by competent evidence, the facts therein set forth. A perfect cause of action was stated against the defendant Kervin, entitling the plaintiffs to the recovery of a personal judgment against him, for a large sum of money and for the other relief which was demanded in the complaint. The complaint states, in substance, that the plaintiffs, Isaac Willetts and William Cranston, were the owners of and had the right to operate and mine for oil, on certain premises which are specifically described, and as to another parcel they were entitled to one-eighth of the oil which might be produced thereon by other parties as a royalty to be paid to them. They were in possession of the first named parcel, and had drilled five oil wells thereon, which were productive, and which had produced a considerable quantity of oil. There was connected therewith, and used in developing the property, engines, derricks, pumps, drills and tanks for storing oil, such as are commonly used in that business. By an instrument, under seal, which is set forth in the complaint, the plaintiffs sold and transferred all their interest in the said property, together with the said machinery and apparatus, and in the royalty, before mentioned, to the defendant, Thomas Kervin, who agreed to pay therefor \$32,000, and the complaint alleges that at the time of the commencement of the action there was due and unpaid on said contract \$7,000. It is also alleged that Kervin entered into the possession of the premises, operated the wells and produced a large



quantity of oil. It is also averred that the other plaintiff, Leonard Willets, acquired an interest by purchase in the contract of bargain and sale prior to the commencement of this action. The plaintiffs also claim that by virtue of the contract they have a lien upon all the property which was the subject of the sale and the oil which has been produced, or which may be produced, as a security for the unpaid purchase-money, and seek in this action to enforce such lien, and for a personal judgment against Kervin for any deficiency that may exist after a sale. In the contract immediately following Kervin's promise to pay the purchase-price, there is a provision that, "all rigs, tanks, boilers, engines, tubing and casing now upon said land, or hereafter put upon the same, shall remain upon the same, as part and parcel of the said premises, until all payments shall be made and completed herein," and the concluding paragraph of the agreement is as follows: "It is further agreed, by and between the parties hereto, that in case of failure on the part of said Kervin to make the payments herein at the time they shall respectively fall due, for the period of ten days, then after such failure to meet such payment, all oil produced upon the said premises shall thereafter be run into the lines to the credit of Isaac Willets, as a security for such payments." At the time of the sale there was some oil in store in the tanks on the premises, and the contract also contains this clause: "All the oil produced upon the above premises shall be the property of the said Kervin, or if any be sold the avails thereof shall belong to him." It is manifest, when taken in connection with the averments of the complaint, that the last-mentioned term of the contract, just quoted, was intended to be a sale of the oil in store at the time of the making of the agreement. We are inclined to the opinion, and in disposing of this appeal we shall view the contract as a sale *in presenti*, and vesting the title of all the property in the vendee.

The respondents' position is, that as against Kervin the plaintiffs had no lien upon the property, and could only recover a personal judgment against him, and for that reason they were unnecessary parties, and there could be no advantage secured to the plaintiffs by retaining them as parties defendant to the action, pending the trial of the issues between them and Kervin. In our consideration of this question we have reached the contrary conclusion, and think

that the plaintiffs have an equitable lien upon the property and the oil produced until the entire purchase-price is paid. As the vendors were the owners of the fee of the land, their interest in the wells, and all the machinery used in operating the same, must be regarded as personal property, as between the parties to this action, by force of chapter 372 of the Laws of 1883, which provides: "All oil wells and all fixtures connected therewith, situate on lands leased for oil purposes, and oil interests and rights held under and by virtue of any lease, or contract, or other right or license to operate for or produce petroleum oil, shall be deemed personal property, for all purposes except taxation."

As to a lien arising from the express contract of the parties, the general rule, as stated by one of the elementary writers, is: "That every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands, not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or incumbrancers with notice." (3 Pomeroy's Eq. Juris., § 1235.)

The promise of the vendee was to give a security upon the oil produced, and the form and manner in which the same was to be perfected, so as to give the vendor some written evidence of their lien, was not provided for in the agreement. But, notwithstanding this omission, and regarding the contract as a mere executory promise to give a lien, courts of equity regard such a promise as creating an equitable lien which will be enforced as against the party promising to give the lien and those who claim under him who are not innocent purchasers. (Pomeroy's Eq. Jurisprudence, 373, § 1237.)

In this State the general rule, as stated, has been applied in particular cases so as to carry out and consummate, in an effective manner, the real intention of the parties, as stipulated in their agreement.

In *Husted v. Ingraham* (75 N. Y., 251) the plaintiff sold and delivered a quantity of carpeting to their vendees, which were put

down in their hotel, with the understanding that the purchasers should secure the purchase-price to the vendors by a chattel mortgage. The purchasers' notes were received without exacting a chattel mortgage upon the carpets, and, thereafter, a receiver was appointed of the property of the purchasers, and he claimed a title to the carpets. In commenting upon the rights of the parties, the court said: "The carpets having been delivered under an agreement that the price should be secured by a mortgage thereon, that agreement could have been specifically enforced in equity and constituted an equitable lien upon the property as against J. E. Miller & Co. (the purchaser), and all persons claiming through or under them, except *bona fide* purchasers having no notice of the lien."

In *Hale v. Omaha National Bank* (49 N. Y., 626), the lessees of a hotel property agreed, in writing, in one of the clauses of the lease, to give their vendors a lien to secure the payment of rent, upon all the furniture which they should place in the hotel. The defendant seized the property and converted the same to his own use without any claim or color of title. The court, in holding that the plaintiff had an equitable lien upon the property, said that the parties evidently contemplated some further and other act or deed, to complete and perfect the security, but, notwithstanding the failure to do so, the lessors had a right, as soon as the lessees placed the furniture in the hotel, and they could have required of them security in proper form upon the property, and had they refused, upon request, to give the lien agreed upon, a specific performance would have been decreed, and the court would have seized hold of the executory promise and regard that as done which the parties had promised to do, and thus secure to the lessor a perfect and effective lien, as stipulated in the agreement. (See, also, *Flagg v. Mann*, 2 Sumn., 487; *Chase v. Peck*, 21 N. Y., 581; *Gilson v. Gilson*, 2 Allen, 115; *Peckham v. Haddock*, 36 Ill., 38; *Chadwick v. Clapp*, 69 id., 119.)

As to the other items of property we think, on reading all the provisions of the agreement, that it was the intent and purpose of the parties to give the vendors a lien thereon for the purpose of securing the unpaid purchase-money, and the clause which provides that the same should remain upon the premises and as a part and parcel of the same until all the payments should be made and

completed, was inserted for the purpose of securing that end. The form or particular nature of the agreement which will be sufficient to create a lien is not very material, for equity looks to the final intent and purpose of the parties rather than at the form, and if the intent appeared to give, or to charge, or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified the lien follows. (Pomeroy's Eq. Juris., § 1237 and the cases cited in the foot notes.)

The fact, as alleged in the complaint, that Kervin had abandoned the premises and the plaintiffs had regained possession of the same and are engaged in operating the wells and receiving the product of oil and the avails thereof, is no bar to his maintaining an action to foreclose this lien, and is an additional reason why they should institute foreclosure proceedings and render an account of the avails of the property so that the true amount of the unpaid purchase-money may be ascertained.

The defendant Reid is the general assignee of Kervin, and for that reason he is a proper party defendant. As to the other defendants the complaint avers that they have or claim some interest in the property subsequent and subordinate to the lien of the plaintiff, and in their answers they set up a lien upon the property and claim that the plaintiffs' debt has been fully paid and satisfied. The plaintiffs having a lien on the property as against their vendee, in an action to foreclose the same, there can be no doubt whatever but that the defendants named were proper parties in this action. (*Fowler v. Mutual Life Ins. Co.*, 28 Hun., 198; *Brown v. Volkening*, 64 N. Y. 76.)

The judgment should be reversed, new trial granted, with costs to abide the event.

SMITH, P. J., HAIGHT and BRADLEY, JJ., concurred.

Judgment reversed and new trial ordered, costs to abide event.

CARLOS E. CHAFFEE, RESPONDENT, v. CALISTA GODDARD,  
AS ADMINISTRATRIX, ETC., OF SETH W. GODDARD, DECEASED,  
APPELLANT.

*Evidence — when the execution and delivery of a mutual agreement is a personal transaction within the meaning of section 829 of the Code of Civil Procedure.*

This action was brought by one Cochran against the defendant, as administratrix of one Goddard, to recover damages sustained by Cochran by reason of the failure of Goddard to convey the undivided one-half of a farm to the plaintiff, as he had, by a sealed agreement made between the parties, agreed to do. The agreement was not acknowledged by either party, and there was no subscribing witness thereto. Upon the trial, for the purpose of proving the execution and delivery of the agreement, Cochran was called as a witness in his own behalf and stated that he was acquainted with Goddard. His counsel then placed in his hands the alleged agreement and asked him if he executed the same, to which question he was allowed, against the objection and exception of the defendant's counsel, to answer that it was his signature.

*Held*, that it was error to allow him so to do.

That as the agreement was one, *inter partes*, which would not be binding upon either, unless executed by both with a mutual understanding that upon placing their signatures thereto it should be considered a complete agreement, binding and operating upon both parties, its execution and delivery was a mutual transaction between the parties, as to which the plaintiff was incompetent to testify.

*Simmons v. Havens* (101 N. Y., 427, 488) distinguished.

APPEAL from an interlocutory judgment entered upon the decision of the court at the Erie Special Term.

The original plaintiff was Byron Cochran, who died since the entry of judgment, and the respondent has been substituted as his personal representative. The action was founded upon the covenants of Seth W. Goddard, deceased, as contained in an agreement between himself and Byron Cochran, deceased, the 5th day of August, 1853, by the terms of which Goddard, in consideration of the sum of five dollars and certain covenants entered into on the part of Cochran, agreed to convey to him by a good and sufficient warranty deed the one undivided half of a farm containing two hundred acres of land subject to a mortgage referred to and described in the agreement. The Special Term found that Cochran fully performed the covenants and agreements on his part, and that

said bond and mortgage was fully paid and discharged. Goddard, in his lifetime, sold and conveyed the property to a third party and received the pay therefor, and up to that time enjoyed the rents and profits of the farm. By the interlocutory judgment, the defendant was required to account before a referee for one-half the moneys received on the sale of the farm, and to render an account as to the rents and profits derived from the land, and the amount of taxes paid by him.

*Sprague, Morey & Sprague*, for the appellant.

*Day & Romer*, for the respondent.

BARKER, J. :

The agreement upon which the action was founded is under seal and purports to be executed by both of the parties thereto. It was not acknowledged before any officer by either party, and there was no subscribing witness thereto. This alleged agreement is fully set forth in the complaint, and the defendant in her answer denies the execution and delivery of the same, and the record title to the property was admitted to be, at the date of the instrument, in the deceased, Seth W. Goddard. On the trial, for the purpose of proving the execution and delivery of the instrument, the original plaintiff, Byron Cochran, was examined as a witness in his own behalf. After stating that he was acquainted with Mr. Goddard, his counsel placed in his hands the alleged agreement, and he was then asked if he executed the same. The defendant objected to the question, that it was not competent for him to prove the execution of the agreements on his part, as it involved a personal transaction or communication between the witness and Mr. Goddard, the other party to the instrument, and he was incompetent to testify on that subject, by the provisions of section 829, Code of Civil Procedure. The objection was overruled and the defendant excepted, and the witness answered that it was his signature. He was then asked if he knew the handwriting of Seth W. Goddard. This was objected to by the defendant's counsel, without stating the grounds upon which it was made, and it does not appear that the court made any ruling thereon, or that any exception was taken, but the witness answered the question that it was the genuine signature of Seth

W. Goddard. By another witness the signature of Goddard was proved. The contract was then received and read in evidence.

The question is thus presented whether the plaintiff, as surviving party to the alleged contract, was a competent witness to prove its execution on his part. The appellant claims that his evidence proving the execution of the contract, related to a personal transaction as a communication between himself and the deceased party thereto. The agreement being one *inter partes*, it would not be binding upon either, unless executed by both with a mutual understanding, that upon placing their signatures thereto, that it should be considered a complete agreement binding and operative on both as parties. The law implies, the contrary not appearing, that the parties thereto both signed the agreement at the same time and in the face of each other. Without personal negotiations, mutual in their character, no agreement could have been made and concluded between the parties. The written instrument is the record and the only legitimate proof of the oral contract. It seems plain, beyond all rational argument, that the execution and delivery of the instrument was a mutual transaction between the parties. The defendant's answer put in issue the execution and delivery of the agreement and it was essential for the plaintiff to prove, in order to sustain a recovery, that he did, on his part, execute the contract at a time and under such circumstances so as to give it the character of mutuality. It may be true that the agreement bears the genuine signature of the plaintiff as well as that of the defendant, but it might also be true, as a matter of fact, that the plaintiff's signature was written by him long after the deceased subscribed the same, or even after his death. Proving the plaintiff's signature, as the execution of the agreement on his part, was not evidence proving an extrinsic and isolated and independent fact, separate and distinct from the transaction which gave validity to the agreement.

Parties to actions are competent witnesses in their own behalf, upon all issues involved in the controversy, except in the cases enumerated in section 829. That section provides that a person interested in the event of the action shall not be a witness, in his own behalf, against the executor or administrator or survivor of a deceased party, concerning a personal transaction or communication between the witness and the deceased person. Any transaction

between the witness and a deceased person in which the witness in any manner participated and all communications between the person deceased and the witness, if he in any way was a party thereto, are within the rule of the statute which disqualifies the witness from testifying in relation thereto. The object and purpose of the statute is plain and clear, and has been stated in many of the reported cases and applies to all cases where the deceased party, if living, could contradict, explain or qualify the evidence as proposed to be given by the survivor as a witness in his own behalf.

In *Holcomb v. Holcomb* (95 N. Y., 316) the court, in remarking upon the provisions of the section, stated: "The words of exclusion are as comprehensive as language can express. Transactions and communications embrace every variety of affairs which can form the subject of negotiation, interviews or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition or language of another. The statute is a beneficial one and ought not to be limited or narrowed by construction."

It would seem to be obvious that the plaintiff's evidence proving the execution of the contract on his part involved an interview between himself and the deceased. This conclusion seems to be sustained by the decisions of the courts in many cases not unlike in principle from the one before us.

In *Garvey v. Owens* (37 Hun, 498) the action was founded upon an agreement in writing between John and James Garvey relative to a piece of land of which James had the title, and by which he had agreed to convey the same to the plaintiff, who was the son of John Garvey. James Garvey having died, the plaintiff commenced an action against the heirs-at-law of James Garvey to enforce the agreement. To prove the execution of the agreement John was called as a witness, and the court held that the proof of the signatures to the instrument by John Garvey related to a personal transaction between them, and was, in effect, a statement that the instrument was the embodiment of an agreement made between them, and for that reason he was an incompetent witness.

In *Pease v. Barnett* (30 Hun, 525) the action was brought by the plaintiff upon a bond given to him by Azuba Carpenter, a married woman. She being dead the action was brought against her execu-



tor, and it was defended upon the ground that the bond was, after its execution, altered by the insertion of a clause, making the same in terms bind the separate estate of Azuba, the deceased. Upon the trial the plaintiff was called as a witness in his own behalf and testified that he was not present when the bond was signed, but that he saw it in the hands of his attorney after it was drawn and shortly before its execution, and then it contained the clause in question as it appeared upon the bond, and it was held that the evidence was incompetent for the reason that it related to a personal transaction with the deceased, the court remarking that if the deceased obligee had been living at the time of the trial she might have contradicted the plaintiff on that point by a statement that the clause in dispute was not inserted when she executed the agreement.

In *Milligan v. Robinson* (16 N. Y. Weekly Dig., 96) it was held that the surviving party to an agreement was not a competent witness to prove its delivery by the deceased party in an action against the latter's personal representatives. (See, also, *Resseguie v. Mason*, 58 Barb., 89; *Denham v. Jayne*, 3 Hun, 614.)

In *Pinney v. Orth* (88 N. Y., 447) the question under consideration was whether the fact testified to by the surviving party to a contract related to a transaction between himself and a deceased party thereto, and the court remarked that the language of the prohibition is sufficiently broad to prohibit the survivor from testifying that any particular communication or transaction did or did not take place personally between himself and the deceased, but did not preclude the survivor from testifying to any independent or extraneous facts or circumstances which tended to prove that there was never any transaction or conversation between the parties of the character relied upon by the representatives of the deceased party, as, for instance, that the survivor at the time was absent from the country where the transaction is said to have occurred, or that he was not at the place where it was claimed that the conversation took place, so long as he refrained from testifying to anything that was or was not said or done between himself and the deceased.

The case of *Simmons v. Havens* (101 N. Y., 427, 433) does not, in our opinion, sustain the rulings. In that case the plaintiff was the grantee in a deed, and in an action of ejectment against the heirs of the grantor, who claimed title under him, the plaintiff was

permitted to prove that the grantor's signature was genuine. It did not appear that the grantee received the deed from the hands of the grantor, and it was held that her evidence did not necessarily involve a personal transaction with the deceased grantor, as the grantee might have received the deed from the hands of a third person. The deed, if delivered, would be effective to convey the title to lands, although the parties thereto never had any negotiations concerning the execution and delivery of the deed. In the case before us it was incumbent on the part of the plaintiff to establish the mutuality of the agreement and its delivery. It is a contract containing mutual and reciprocal covenants, and the writing is the record of their previous oral negotiations.

If the plaintiff's evidence was pertinent and material for any purpose in this case it was to establish that he executed the agreement at the same time that it was executed by the deceased, and that they then and there mutually understood that the instrument was made complete as to its execution and became binding upon both parties.

As there must be a new trial for error in receiving the evidence of the plaintiff, we do not deem it profitable now to discuss the other questions argued by the learned counsel for the appellant.

The judgment should be reversed, new trial granted, with costs to abide the event.

SMITH, P. J., HAIGHT and BRADLEY, JJ., concurred.

Judgment reversed and new trial ordered, costs to abide event.

THE BUFFALO LUBRICATING OIL COMPANY (LIMITED),  
RESPONDENT, v. THE STANDARD OIL COMPANY OF  
NEW YORK, APPELLANT, IMPEADED WITH OTHERS.

SAME, RESPONDENT, v. ACME OIL COMPANY, APPELLANT,  
IMPEADED WITH OTHERS.

*Actions in tort — a several judgment may be rendered against one of several defendants — liability of a corporation for slandering the business of another corporation carrying on the same business — what facts show this to have been done — a pleading should allege that the acts complained of were done by the corporation and not by its agent.*

The plaintiff, a corporation organized under the laws of this State for the purpose of manufacturing, refining and selling oil, brought this action against seven defendants, three of whom were corporations, one of them being the Standard Oil Company, a corporation organized under the laws of this State and engaged in carrying on the same business as the plaintiff. The plaintiff's cause of action was based upon the charge that the defendants had combined and confederated together for the purpose, and in the manner set forth in the complaint, of ruining the plaintiff's business and driving it out of the market. Upon an appeal from a judgment overruling a demurrer interposed by the defendant, the Standard Oil Company, upon the ground that the complaint did not state facts sufficient to constitute a cause of action:

*Held*, that it was not necessary to examine the complaint for the purpose of ascertaining whether a good cause of action was stated as against the defendants, other than the Standard Oil Company, for the reason that, in actions of tort, judgment may be entered against either of the defendants, when more than one is joined, if the proofs establish a cause of action against such defendant.

That it would not be necessary to prove upon the trial the conspiracy alleged in the complaint, except for the purpose of securing a joint recovery against all the defendants.

It was alleged in the complaint that the defendants, other than the Standard Oil Company, formed a conspiracy to injure the plaintiff, and did certain acts injurious to the plaintiff, in pursuance of such conspiracy, prior to the time at which the defendant, the Standard Oil Company, was organized; that after that defendant was organized it joined and became a party to the conspiracy and ratified said previous actions; that after the organization of that defendant, the conspirators, by letters and other means, requested various customers of the plaintiff not to purchase oil from it, and represented that the plaintiff's oil was of inferior quality, and that the plaintiff had no right to make such oils and vend the same on the market, and threatened the defendant's customers with law suits and expenses if they continued to patronize the plaintiff

and purchase its commodities, and employed one Stearn to make such statements, and that he did make the same at the city of Boston and in other places in the State of Massachusetts, and in various parts of New England, to certain customers of the plaintiff, and, by reason thereof, the plaintiff lost many of its said customers and much of its trade and business and suffered great loss and damage in consequence thereof; that the said conspirators, by their agents and servants, did falsely represent to the customers of the plaintiff, that said conspirators or some of them, had patents that covered the entire product of plaintiff's manufacture, and that the plaintiff had no right to make the oil it was then manufacturing, and that all who bought oil of the plaintiff were infringing the patents of some one or all of the said conspirators, and that one or more of said conspirators would bring actions for such infringements against each and every of the customers of the plaintiff who bought oils or dealt with the plaintiff, by reason of which they prevented many of the plaintiff's customers from purchasing oil from it.

*Held*, that it was manifest that by the use of the term conspirators the plaintiff intended to charge all of the defendants, including the Standard Oil Company, with the illegal acts alleged to have been done.

That if the acts thus charged were proved to have been done by the defendant, the Standard Oil Company, through its officers or agents, it had slandered the plaintiff's business and committed an inexcusable wrong condemned by the laws of the land as well as by honorable traders and merchants.

That in stating his cause of action against the corporation it was proper for the plaintiff to charge that the acts complained of were the acts of the corporation itself, and that it was not necessary, nor would it be proper, to aver that they were done by and through the authorized agent of the corporation.

APPEAL from a judgment overruling a demurrer of the defendant, the Standard Oil Company of New York, interposed to the plaintiff's complaint, upon the sole ground that the facts stated therein did not constitute a cause of action against it. Six other defendants are named, four of them being persons and two corporations. The Standard Oil Company of New York, the party demurring, is a business corporation organized under the laws of the State of New York, engaged in manufacturing and refining oil and placing the same upon the markets of the country. The plaintiff, a corporation organized under the laws of this State, is also engaged in manufacturing and refining oil and selling the same to merchants and traders in this and other States

*Geo. J. Sicard*, for the appellants.

*E. W. Hatch* and *Adelbert Moot*, for the respondent.

**BARKER, J. :**

The plaintiff's cause of action is based upon the charge that the defendants have combined and confederated together, for the purpose and in the manner set forth in the complaint, of ruining the plaintiff's business and driving it out of the market as a competitor with the defendant, which is also engaged in manufacturing and selling the same kind of products. The single legal proposition presented by the demurrer is, whether the complaint set forth facts showing that the defendant has been guilty of a wrong which has resulted in an injury to the plaintiff. If so, a perfect cause of action is stated and the demurrer was properly overruled. It is wholly immaterial to examine the complaint for the purpose of ascertaining whether a good cause of action is stated against the other defendants or not, for the reason that in actions of tort judgment may be entered against either of the defendants, when more than one is joined, if the proofs establish a cause of action against the defendants. It is not questioned but what the complaint set forth a good cause of action in tort against the four persons named as defendants, and a joint judgment may be entered against them if the facts charged be sustained upon the trial. They are charged with having conspired together to injure the plaintiff in its business, and with having done certain overt acts in carrying out their purpose which have resulted in a pecuniary loss to the plaintiff. The plaintiff contended, on the argument, that the complaint charged, in proper and sufficient terms, that the defendant, the Standard Oil Company of New York, had joined the conspiracy after it had been formed by the defendants, and since that time all the defendants have done certain overt acts in furtherance of such common design and purpose, and that it was jointly liable with the other defendants for all the damages resulting to the plaintiff growing out of the unlawful combination as it was originally formed.

It is clear, as it seems to me, that it is unnecessary to determine whether the complaint will bear that construction or not, in view of the rule that in actions of tort judgment may be entered against such of the defendants against whom a cause of action is made out. The single inquiry now before us is, whether, upon the facts as stated, a judgment may be rendered against this defendant, if the plaintiff fails to prove a like cause of action against all or either of

the other defendants. On the trial it is not necessary to prove a conspiracy between the defendants, if one is alleged in the complaint, except for the purpose of securing a joint recovery against all. (*Hutchins v. Hutchins*, 7 Hill, 107; *Buffalo Lubricating Oil Company v. Everest*, 30 Hun, 586.)

That a perfect cause of action against this defendant is set forth in the complaint, is clear and indisputable. It is a business corporation, organized under the laws of this State in the year 1882, and since then has been engaged in extensive operations in the same towns and cities where the plaintiff is engaged in a like business. The complaint charges the other defendants with having formed a conspiracy to injure the plaintiff, and done certain acts injurious to the plaintiff, in pursuance therewith, prior to the time this defendant was organized and went into existence as a corporation. The complaint then charges that after the defendant came into existence it joined and became a party to the conspiracy, and ratified its previous action. It is then further charged, as of a time after the defendant was organized, that the conspirators, that is, all the defendants, by letters and other means, requested various customers of the plaintiff not to purchase oil from it, and represented that the plaintiff's oil was of inferior quality, and that the plaintiff had no right to make such oils and vend the same on the market, and threatens the defendant's customers with law suits and expenses if they continued to patronize the plaintiff and purchase its commodities; and employed one Stearn to make such statements, and that he did make the same at the city of Boston, and in other places in the State of Massachusetts, and in various parts of New England, to certain customers of the plaintiff, and by reason thereof the plaintiff lost many of its said customers and much of its trade and business, and suffered great loss and damage in consequence thereof. That the said conspirators, by their agents and servants, did falsely represent to customers of plaintiff that said conspirators, or some of them, had patents that covered the entire product of plaintiff's manufacture, and that the plaintiff had no right to make the oil it was then manufacturing, and that all who bought oil of the plaintiff were infringing the patents of some one or all of the said conspirators, and that one or more of said conspirators would bring actions for such infringements against each and

every of the customers of the plaintiff who bought oils or dealt with the plaintiff, for such infringement of the said patents, and that by reason thereof, the said conspirators did prevent many of the customers of the plaintiff from purchasing oils of, or from dealing with it, and did take from the plaintiff many of its customers to the great damage of the plaintiff. The complaint also avers that, of a time subsequent to the creation of this defendant as a corporation, the defendant did other wrongful acts to the detriment and pecuniary injury of the plaintiff.

In that part of the complaint, of which the substance has just been stated, it is manifest that by the use of the term conspirators the pleader intended to charge all of the defendants, including the Standard Oil Company of New York, with being actors in the performance of the illegal acts charged. If the acts thus charged to have been done by the defendants are proved upon the trial to have been done by this defendant, through its officers or agents, it has slandered the plaintiff's business and committed an inexcusable wrong condemned by the laws of the land as well as by honorable traders and merchants. It is charged that this defendant, together with the other defendants, employed a particular person to repeat the slanders to and among the plaintiff's customers, and his acts in the eyes of the law are the acts of the defendant and it becomes liable for all the damages sustained by the plaintiff by reason thereof. The general rule upon that subject is, as established by the recent cases, that "for the acts of the servant, within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible whether the act be done negligently, wantonly or even wilfully." In general terms, if the servant misconducts himself, in the course of his employment, his acts are the acts of the master, who must answer for them. (*Mott v. Consumers' Ice Company*, 73 N. Y., 543.)

In *Reed v. The Home Savings Bank* (130 Mass., 445), the court said that, "by the great weight of modern authority, a corporation may be liable even when a fraudulent or malicious intent in fact is necessary to be proved, the fraud or malice of its authorized agents being imputable to the corporation; as in actions for fraudulent representations." (See, also, 2 Addison on Torts, 73.)

There is great justice and fairness in this rule, otherwise injustice might be done to individuals if their remedy for wrongs authorized by corporations were to be confined to actions against the agents employed by the corporation. Since in these times a vast portion of the business of the country is carried on by corporations, guided and stimulated in their action by the advice and under the direction of shareholders, who desire to make their investment profitable, this rule should not be narrowed or limited in any degree by the decisions of the court.

If the views already expressed are sound, then it becomes wholly unnecessary to consider the proposition much discussed upon the argument, by the learned counsel for the defendant, that a corporation cannot become a party to a conspiracy. Although it is difficult to see why it may not, and authority may be cited holding that it can join a conspiracy and become liable for the action of all the conspirators. (*Dodge v. Bradstreet Co.*, 59 How., 104; *Morton v. Metropolitan Life Ins. Co.*, 84 Hun, 387.)

The plaintiff in stating his cause of action against a corporation may, and should state the acts complained of as being the acts of the corporation itself, and it is not necessary nor proper to aver in the complaint that they were done by and through the authorized agent of the corporation. It is a matter of proof upon the trial to establish that the person who did the act was the authorized agent of the defendant, for it can only act through its officers and agents. When a charge is made in a pleading against a corporation by its corporate name, the legal inference is that some person or persons in its employ did the act imputed. (1 Chitty on Plead., 286; 2 Wait's Pr., 376; *Stoddard v. Onondaga Conference*, 12 Barb., 575.)

Judgment affirmed, with costs, and with leave to the defendant to withdraw the demurrer and answer on payment of the costs of the demurrer and of this appeal, within twenty days.

SMITH, P. J., and BRADLEY, J., concurred; HAIGHT, J., not sitting.

Judgment in each case affirmed, with costs, with leave to the defendant to withdraw demurrer and answer the complaint in twenty days, on payment of the costs of the demurrer and of this appeal.



# MEMORANDA

OF

## CASES NOT REPORTED IN FULL.

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FREDERICK J. BLAESI AND OTHERS, APPELLANTS, v. CAROLINE BLAESI, WIDOW OF JACOB F. BLAESI, RESPONDENT.

*Evidence as to personal transactions with a deceased person — to what cases the prohibition does not extend — Code of Civil Procedure, sec. 829.*

APPEAL from a judgment of the Monroe Special Term, dismissing the complaint.

The action was brought to establish a deed of conveyance alleged to have been made by the defendant to Jacob F. Blaesi, who subsequent to such conveyance became her husband; who, having title, conveyed the premises to one Jacob Stubenbord, on May 18, 1874, and on May 17, 1877, he married the defendant. In June, 1877, Stubenbord conveyed the premises to her. Jacob F. Blaesi, the husband, died intestate in December, 1888. The plaintiffs are his heirs-at-law, and they allege that the defendant, the widow of Jacob F. Blaesi, made and delivered to him, in 1882, a deed of conveyance of the land in question. They demand judgment that the deed may be produced, and that they be adjudged the owners of the premises, as such heirs, subject to her right of dower. The allegations as to the conveyance are put in issue by the defendant's answer.

The trial court found that the defendant took title from Stubenbord, and has since continued to be, and is the owner, and in the possession of the premises, and directed judgment dismissing the complaint on the merits.

The court at General Term, after holding that this finding was supported by the evidence, said: "The difficulty arises upon exceptions taken to the exclusion of evidence on the trial. One of the plaintiffs testified that a conversation took place between the defendant, her husband and himself, and his evidence of such con-

versation was excluded as incompetent, under Code of Civil Procedure, section 829. The witness was a party, and interested in the event, and was examined in his own behalf and interest and that of his co-plaintiffs, but not against the executor, administrator or survivor of a deceased person, or a person deriving title from, through or under a deceased person. The defendant took her title from a person other than her husband, and although her grantor took his title from him, that fact does not presumptively place her within the relation to the deceased required to give application to the inhibition of the statute referred to. Her grantor would be excluded as against her from testifying to personal communications had by him with the deceased. This contest is between the defendant and the heirs of the decedent. They claim under him, and as against them the defendant would not be permitted to relate personal transactions or communications had by her with him in his life time, but their transactions with him, as against her, do not seem to come within the letter or spirit of the provisions of such section. The exception to the exclusion of the evidence seems to have been well taken. And we think the striking out the statement of the witness, that he saw the deed in the possession of the husband, was error, not only for the reason before given, but because it did not, as it stood, tend or purport to prove any personal transaction between him and the witness.

"There seems to have been no error upon the trial or in the decision, other than in the rulings excluding and striking out the evidence referred to, and for those reasons the judgment should be reversed and a new trial granted, costs to abide event."

*Barhite & Reed*, for the appellants.

*William E. Werner*, for the respondent.

Opinion by BRADLEY, J.; SMITH, P. J., and BARKER, J., concurred; HAIGHT, J., not sitting.

Judgment reversed and new trial ordered, costs to abide event.

EUGENE E. LEWIS, AS EXECUTOR, ETC., OF CHARLOTTE  
J. LEWIS, DECEASED, RESPONDENT, v. ENOS MERRITT,  
APPELLANT.

42 161  
91 325

*Action for the conversion of personal property — the burden of proving a gift rests upon the party claiming it — when a charge that the defendant must establish the gift beyond a suspicion will be sustained.*

APPEAL from a judgment in favor of the plaintiff entered on a verdict rendered at the Yates Circuit.

This action was brought to recover damages because of the alleged conversion of certain promissory notes, executed by the defendant to the plaintiff's testatrix, who was the sister of the defendant and the mother of the plaintiff.

The defendant, by his answer, admitted the execution and delivery of the notes to the deceased; alleged that before and at the time of her death he was rightfully and lawfully in the possession of the notes, and they were then his property, and denied that they were the property of the deceased at the time of her death.

The action has been tried three times, each trial resulting in a verdict for the plaintiff. The first verdict was set aside and a new trial granted on the ground of newly discovered evidence. The judgment on the second verdict was reversed by the Court of Appeals, for the improper exclusion of evidence. (98 N. Y., 206.)

The court at General Term said: "The notice of the present appeal purports to be from an order denying a motion for new trial, as well as from the judgment, but no such order appears in the case. The only questions to be considered, therefore, are those presented by exceptions.

"The appellant's counsel contends that there is no evidence of a wrongful taking. The statement of the evidence on that point, contained in the opinion of RUGER, Ch. J., on the review of the second trial (98 N. Y., 207, 208), may be adopted as an accurate summary of the evidence given on the last trial, and is substantially as follows:

"The plaintiff, as a witness in his own behalf, testified, in substance, that the notes in suit were, for some time previous to his mother's death, kept in a tin trunk under the bed in the room

occupied by her, and that he saw them there on the morning before she died, and that upon examining the trunk on the following morning he found that the notes had been abstracted. Another witness testified that the notes were afterwards found in the possession of the defendant, who, when they were demanded of him, refused to surrender them. The plaintiff also testified to facts showing the presence of the defendant in the room where the notes were kept during the last hours of his mother's illness, and the opportunity thereby afforded him to obtain unauthorized possession of them. The learned chief judge, speaking for the majority of the court, said that the evidence thus tended both to establish ownership of the notes by the testatrix, by creating a presumption, arising from the fact of possession, and by inference to controvert the probability that the defendant came rightfully into possession of the notes by means of a prior disposition of them by her. As the testimony upon the point is substantially the same now as it was then, the decision of the court of last resort is conclusive upon the question. \* \* \*

"The trial judge charged the jury that the defendant, in order to hold this property by virtue of a gift, must establish it beyond a suspicion. To that instruction the defendant excepted. The charge accords with the rule stated by PECKHAM, J., delivering the opinion of the court, in *Grey v. Grey* (47 N. Y., 552). That was an action on a promissory note given by a son to his father, on settlement of accounts, payable one year from date, with interest. The father died about four months after the note was given. The suit was brought by his personal representatives. On the trial the defendant produced the note with his name torn off. He testified that he had it in his possession prior to his father's death; that he never took the note from the drawer of his father, and he did not know of any third person owning or possessing the note; that he never paid it, or transferred or delivered to intestate any property, nor was the intestate indebted to the defendant since giving the note. It appeared that the defendant had means of access to his father's papers. In that case, as in this, it did not appear affirmatively how the defendant became possessed of the note. Judge PECKHAM said: 'If any presumption of title or of payment prevail, by mere possession, it is only where the possession is free from sus

picion.' (P. 555.) And after stating that the law does not presume a gift, he said: 'If this were claimed as a *donatio mortis causa*, then the rule is still more rigid that the clearest proof on the part of the claimant is required. It must be established beyond suspicion.'

"This can hardly be regarded as a mere *dictum*, as suggested by the appellant's counsel. There being no proof of the manner in which the defendant became possessed of the note, it was pertinent to consider the case in all its aspects, and, as the hypothesis of a *gift mortis causa*, was consistent with the evidence, its consideration was not so far foreign to the case, as that what was said respecting it can be regarded as a mere passing remark lacking authority.

"It is contended that the authorities cited by Judge PECKHAM do not sustain him. They are: *Walter v. Hodge* (2 Swansl., 97; 2 Kent [8th ed.] 444); *Countant v. Schuyler* (1 Paige, 316). The latter case holds that claims of this kind are admitted with great caution, and all agree that the evidence must be satisfactory; by which is meant, doubtless, that the evidence must be satisfactory, in view of the circumstances of each case. Thus, where there are circumstances attending the alleged gift which reasonably excite suspicion as to whether there was a gift, in fact, the proof must be such as to remove the suspicion. We think the rule laid down by the trial judge was not more stringent than the circumstances disclosed by the evidence warranted.

"Some other exceptions were taken by the defendant's counsel, but they have not been argued, and we do not consider them.

"The judgment should be affirmed."

*D. Morris*, for the appellant.

*Delos A. Bellis* and *Charles S. Baker*, for the respondent.

Opinion by SMITH, P. J.; BARKER and BRADLEY, JJ., concurred; HART, J., not sitting.

Judgment affirmed.

JANE R. HATCH AND JOHN CONOLLY, AS ADMINISTRATORS,  
ETC., OF CATHARINE CURBOW, DECEASED, APPELLANTS  
AND RESPONDENTS, v. JOHN L. STEWART, AS EXECUTOR,  
ETC., OF ANGUS McDONALD, DECEASED, APPELLANT AND  
RESPONDENT.

*Reference of a disputed claim against the estate of a deceased person is a special proceeding — an appeal should be taken from the order of the Special Term confirming the referee's report, and not from the judgment — the plaintiff is entitled to recover his disbursements, as a matter of right, under section 817 of the Code of Procedure, which was not repealed by chapter 417 of 1877.*

APPEALS from a judgment, entered upon the confirmation of the report of a referee, in a proceeding to determine a disputed claim against the defendant's testator.

The court at General Term said: "The matter in controversy was referred, pursuant to the statute (2 R. S., 88, § 36, as amended by Laws of 1859, chap. 261). It was heard and a report made by the referee, by which he determined that the plaintiff was entitled to recover. And, upon application to this court, at Special Term, the report was confirmed. There is no appeal taken from the order, but both parties appeal from the judgment only. This is a special proceeding. (*Roe v. Boyle*, 81 N. Y., 305.) Provision was made for appeals from judgments in these proceedings by Laws of 1854 (chap. 270, § 1). That section was repealed by Laws of 1877 (chap. 417, § 2). And our attention is called to no remaining or subsequently enacted statute providing for such appeal. The provisions for appeals from judgments (Code Civil Pro., § 1346) do not seem applicable to special proceedings (id., § 3343, sub. 20). In them, appeals from orders are provided for (id., § 1356). But as both parties treat the case as properly here upon the merits, we will not further pursue the inquiry, or consider that question."

After considering the case upon the merits, and holding that the judgment should be modified in favor of the defendant by reducing the amount of the judgment recovered by the plaintiff, the court added:

"The modification of the judgment should be without costs of this appeal, but the recovery of disbursements, as directed by

the judgment, must stand. The plaintiff was entitled to them as matter of right, because the provisions of section 317 of the old Code to that effect were not repealed by Laws of 1877 (chap. 417). And although the entire provisions of the old Code are embraced in the repealing clause of Laws of 1880 (chap. 245, § 1, sub. 4, and § 2), the then existing right of the prevailing party to recover the fees of referees and witnesses, and other necessary disbursements in a proceeding of this character, is preserved by section 3, subdivision 8 of the same act. (*Hall v. Edmunds*, 67 How., 202; *Sutton v. Newton*, 2 id. [N. S.], 56; S. C., 15 Abb. N. C., 452; 7 N. Y. C. P., 334; *Overheiser v. Morehouse*, 2 How. [N. S.], 257; S. C., 16 Abb. N. C., 208; 8 N. Y. C. P., 11.)

"In *Miller v. Miller* (32 Hun, 481) it was held otherwise, but we think that the provisions of section 317 of the old Code, in the respect referred to, were saved from repeal by the proviso in the act of 1880, before mentioned, and are not superseded by Code of Civil Procedure (§ 3246).

"The judgment should be so modified as to make the recovery one thousand seven hundred and seventy-six dollars and eight cents, and interest thereon from the 15th day of September, 1885, with the fees of referee and witnesses and other disbursements recovered thereby, and as so modified affirmed, without costs of this appeal to either party.

*Edwin A. Medcalf*, for the plaintiffs.

*George D. Forsyth*, for the defendant.

Opinion by BRADLEY, J.; SMITH, P. J., and BARKER, J., concurred; HAIGHT, J., not sitting.

So ordered.

# Cases

DETERMINED IN THE

## FOURTH DEPARTMENT,

AT

GENERAL TERM,

November, 1886.

42 176  
61 365

EDMUND D. CROSLY, RESPONDENT, v. CALVIN F. COBB,  
APPELLANT.

*Costs*—there must be a recovery to entitle a defendant, succeeding on some of the issues, to recover costs—Code of Civil Procedure, sec. 8234.

Upon the trial of this action the court, upon the motion of the defendant's counsel, granted a nonsuit in so far as concerned two of the four counts which were contained in the complaint. The plaintiff recovered a general verdict of fifty dollars.

*Held*, that there was no recovery upon one or more of the issues on the part of the defendant which entitled him to costs, as against a plaintiff, under the provisions of section 8234 of the Code of Civil Procedure.

*Blashfield v. Blashfield* (41 Hun, 249) distinguished.

APPEAL from an order made at the Onondaga Special Term refusing costs to the defendant.

The plaintiff recovered a general verdict of fifty dollars. There was no verdict, or special or general finding upon an issue of fact, in favor of the defendant, at the circuit where the cause was tried before Mr. Justice FISH and a jury.

*J. W. Saggett* and *F. Pierce*, for the appellant.

*A. P. & D. E. Smith*, for the respondent.

HARDIN, P. J.:

Four counts were stated in the complaint. At the trial, upon defendant's motion, it was held that the second count did not state



a cause of action, also the third count, and the court granted a nonsuit so far as that count was concerned. (See Mem. of FISH, J., and proposed certificate referred to in his Mem.)

Before a defendant is entitled to costs, under section 3234 of the Code of Civil Procedure, it must appear that he has recovered upon one or more of the causes of action. (*Briggs v. Allen*, 4 Hill, 538.) It does not so appear in this case. Defendant must stand by and be bound by the holding had at the circuit at his instance.

The section provides that if the plaintiff recovers upon one of the issues of fact, and the defendant "upon the other or others," then costs may be awarded to each party. If the defendant had demurred to the defective counts, and it had been held that they did not state facts sufficient to constitute a cause of action, of course it could not have been claimed that the defendant had recovered "upon an issue of fact;" but instead he raised the question at the trial and it was held, as a matter of law, that the counts were defective. There was no recovery or verdict upon a "cause of action" in favor of defendant. In *Blashfield v. Blashfield* there was an issue of fact as to each of the two notes set out in the complaint, and a recovery by plaintiff on one and a recovery by defendant on the issue of fact as to the other. That case does not aid the defendant here. There was in the case in hand no recovery by the defendant. (*Cooper v. Jolly*, 30 Hun, 224; S. C., affirmed, 96 N. Y., 667; *Kilburn v. Lowe*, 37 Hun, 237.)

Our conclusion is that the Special Term order should be affirmed.

BOARDMAN and FOLLETT, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

42	167
63	21

GEORGE A. FISHER, RESPONDENT, v. GEORGE  
DOUGHERTY, APPELLANT.

*Practice* — power of the court to allow additional affidavits to be read on a motion to vacate an attachment — to order such affidavits to be filed nunc pro tunc — a party accepting a payment under an order cannot thereafter object to such order.

Upon the hearing of a motion to vacate an attachment, made by the defendant upon the papers upon which it was granted, the plaintiff was allowed, without

objection on the part of the defendant, to read two additional affidavits establishing the non-residence of the defendant and the plaintiff's inability to serve him within the State. Thereupon, an order was made permitting the plaintiff, on paying ten dollars to the defendant, to amend his proceedings by filing the said affidavits, as of the date of the issue of the attachments, and amending the former order and other proceedings so as to conform thereto, and directing that if this were done the motions were denied, but if not done, they were granted, with ten dollars costs. The ten dollars were immediately paid to the defendant's attorney, who at first accepted the money but offered, a few days later, to return it to the plaintiff's attorney, who refused to receive it. Upon an appeal by the defendant from so much of the order as allowed the plaintiff to amend his proceedings by filing the additional affidavits *nunc pro tunc*:

*Held*, that as it did not appear that the defendant objected to the reading of the affidavits at the Special Term, he would not be allowed to take exception thereto, in the first instance, on appeal.

That section 724 of the Code of Civil Procedure conferred upon the court power, in its discretion, to allow such an amendment of the proceedings.

That the defendant having accepted the money paid by the plaintiff, in compliance with the terms of the order now appealed from, ought not now to be allowed to complain of the course the discretion of the court took

APPEAL from parts of an order made at the Chemung Special Term; also, a motion to dismiss the appeal.

Plaintiff's complaint was verified March 25, 1885, and stated two causes of action on contract and how they respectively arose. Plaintiff's affidavit stated how the causes of action arose, and "that there are no counter-claims, discounts or set-offs." \* \* \* "The above entitled action is brought for said causes, and the summons has not yet been served. That the defendant is not a resident of the State of New York, but is a resident of the city of Scranton, in the State of Pennsylvania, as deponent is informed and believes." The affidavit was made March 24, 1885. Upon the complaint and affidavit, service of the summons by publication was ordered March 25, 1885. Also, a warrant of attachment was issued and levied. Upon a motion to set them aside, a further affidavit of plaintiff and an affidavit of one Douglass were read by plaintiff. These last named affidavits show the non-residence of defendant, and diligent efforts made to find him in the State and to serve him with the summons. An order was made by the Special Term, 8th of May, 1885, "that on the plaintiff paying to the defendant ten dollars, the plaintiff have leave to amend his proceedings by filing the affi-

avits of George A. Fisher and William H. Douglass, which relate to the non residence of the defendant *nunc pro tunc*, as of the 25th day of March, 1885, and that the order and other proceedings be amended so as to conform thereto, and that being done, the motions are denied; but if not done, the motions are granted, with ten dollars costs of this motion." The ten dollars was immediately paid to defendant's attorney and accepted by him. He offered, a few days later, to return it, and plaintiff's attorney refused to receive the money. It has been retained by defendant's attorney.

Defendant has appealed only "from so much of the order entered therein on the 11th day of November, 1885, as directs that the plaintiff have leave to amend his proceedings by filing the affidavit of George A. Fisher and William A. Douglass, which relate to the non-residence of the defendant *nunc pro tunc*, as of the 25th day of March, 1885, and that the order and other proceedings be amended so as to conform thereto, and directing the clerk of Delaware county to amend the proceedings and file the same accordingly."

*E. D. Cumming*, for the appellant.

*George A. Fisher*, respondent in person.

HARDIN, P. J. :

We need consider only that part of the order specifically appealed from. In doing that, we may observe that the record brought before us does not indicate any objection taken in the Special Term to the offer to read the affidavit of plaintiff of May 6, 1885, and of Douglass, of May 4, 1885. (*Kibbe v. Wetmore*, 31 Hun, 424.)

In the case just cited, SMITH, P. J., said : "But the appeal book does not show that any such objection was made, and, therefore, the defendant is to be regarded as having consented that the affidavits in question be received and fully considered by the court. The defendant cannot now be heard to object for the first time that the affidavits were improperly received, and that the order allowing the amendment should, therefore, be reversed."

The record in respect to them is, viz. : "Chemung Special Term, May 8, 1885. Received on motion and order filed Delaware county clerk's office." However, section 724 of the Code of Civil Pro-

cedure confers upon the court power, in its discretion, to allow an amendment of proceedings had. (*Weeks v. Tones*, 16 Hun, 349; S. C., affirmed, 76 N. Y., 601.) In that case the power of the court was distinctly declared to grant amendments *nunc pro tunc*, although it was said "such an order is not operative as against persons who are not parties to the action." The question before us only relates to the parties to the action. The court exercised its discretion and named the terms, and plaintiff complied. We may approve of the exercise of the power. Defendant having accepted the money paid to comply with the terms of the order, and in the discretion of the court deemed proper, ought not to be heard to complain of the course the discretion of the court took. (*Eagan v. Moore*, 2 Civil Pro. [Browne], 300; *Gribbon v. Freel*, 93 N. Y., 93; Code of Civil Pro., § 723.) (2.) That part of the order which granted costs to defendant is not appealed from. (3.) The notice of appeal does not specify that part of the order which denied the motions as being a part that was appealed from.

These views lead to an affirmance of the order. It may be remarked that it does not appear by the appeal papers that any rights had intervened between the 25th of March and the 8th of May, 1885, and no question in that regard need be passed upon upon this appeal.

The order should be affirmed, with ten dollars costs and disbursements. The motion to dismiss the appeal may be denied, without costs to either party.

BOARDMAN and FOLLETT, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements. Motion to dismiss appeal denied, without costs to either party.

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GEORGE N. BALCOM, APPELLANT, v. FANNIE TERWILLIGER, RESPONDENT.

*Costs — the right thereto is governed by the law in force at the time the right to them accrues — Code of Civil Procedure, sec. 8070.*

In this action, in which issue was joined in December, 1884, the plaintiff, on January 10, 1885, recovered a judgment in a Justice's Court for ninety-three

## FOURTH DEPARTMENT., NOVEMBER TERM, 1886.

dollars and ninety-two cents, from which he appealed, on January 28, 1885, to the County Court demanding a new trial. No offer of judgment was made by the respondent. On June 17, 1886, the plaintiff recovered a judgment in the County Court for eighty-nine dollars and twenty-two cents damages and thirteen dollars and ninety-eight cents interest; in all one hundred and three dollars and twenty cents. Upon an appeal from an order of the County Court setting aside a taxation of costs in favor of the plaintiff and directing costs to be taxed in favor of the defendant:

*Held*, that costs should be granted or refused in accordance with the law existing at the time when the party acquired the right to recover them.

*Garling v. Ladd* (27 Hun, 112) followed.

That as this action was commenced after September, 1880, it did not fall within the exceptional provisions of subdivision 11 of section 8347 of the Code of Civil Procedure.

That the right of the parties to recover costs in this case was to be determined by section 8070 of the Code of Civil Procedure, as amended in 1885, which provides that where neither party makes an offer, the party in whose favor the verdict, upon a decision in the appellate court, is given shall be entitled to recover his costs upon appeal.

That the order of the County Court should be reversed.

APPEAL from an order of the Broome County Court, setting aside a taxation of plaintiff's costs, and striking them from the judgment, and directing costs to be taxed in favor of the defendant.

The action was brought in a Justice's Court, issue being joined therein December, 1884. On the 10th of January, 1885, the plaintiff recovered a judgment for ninety-three dollars and ninety-two cents damages. The plaintiff appealed to the County Court on January 28, 1885, and demanded a new trial. No offer of judgment was made by the respondent. On the 17th of June, 1886, the plaintiff recovered and entered a judgment for eighty-nine dollars and twenty-two cents damages, and thirteen dollars and ninety-eight cents interest, in all one hundred and three dollars and twenty cents. The plaintiff taxed his costs and entered them in his judgment.

*Canniff & Penrie*, for the appellant.

*Carver & Deyo*, for the respondent.

HARDIN, P. J.:

*Garling v. Ladd* (27 Hun, 112) is an authority to the effect that costs "will be granted or refused in accordance with the law existing when the party has the right to costs."

That case was referred to in *Atkin v. Pitcher* (31 Hun, 352), and it was held that in a case brought before 1st of September, 1880, the date when the provisions of the Code of Civil Procedure took effect, the costs were to be taxed under section 371 of the old Code, as subdivision 11 of the Code of Civil Procedure, section 3347, declares that chapters 18 and 19 of the Code of Civil Procedure apply only to an action or special proceeding commenced on or after the 1st of September, 1880. This action was commenced after September, 1880, to wit, on the        day of December, 1884, and, therefore, does not fall under the exceptional provision of section 3347, subdivision 11. Chapter 522 of the Laws of 1885, amended section 3070 of the Code of Civil Procedure, and it took effect on the 3d of July, 1885. If we apply the exception as to when the amendment shall take effect, or if we assume that the section as amended shall be restricted, its application to cases enumerated in subdivision 11 of section 3347, we must say that as this action was commenced after September 1, 1880, it is not excluded from the operation of section 3070, as it stood after the amendment thereof in 1885. We are thus brought back to the general rule, that costs are regulated and given by the statute in force, when the party has the right to costs. By section 3070, as amended in 1885, it is provided, viz: If neither party make an offer as provided herein, the party in whose favor the verdict, report or decision in the appellate court is given, shall be entitled to recover his costs upon the appeal. As no offer was made, and the plaintiff recovered in the County Court eighty-nine dollars, we must hold that his case falls within the provision we have quoted from section 3070 of the Code of Civil Procedure, as amended in 1885, in accordance with cases adjudged. (*Sheehan v. Buller*, 24 Weekly Dig., 168.) If the question were an open one in this court, it might be doubted whether in this case either party were entitled to costs, inasmuch as no offer of judgment, as provided in section 3070, as amended by chapter 522 of Laws of 1885, could be made. It might be questioned whether the legislature intended that the omission of an offer, as provided, should cast a party in costs who, when the appeal was taken, was not authorized to make such offer as that named in section 3070, as amended by the legislature in 1885. (*Railroad Co. v. Roach*, 80 N. Y., 339; *Engel v. Fischer*,

15 Abb. N. C., 72; *People v. Commissioner of Taxes of N. Y.*, 95 N. Y., 559.)

However, as before remarked, we must follow *Sheehan v. Buller* (*supra*), and the cases referred to in the opinion of Mr. Justice FOLLETT, and apply section 3070, as amended in 1885, to this case, and reverse the order of the County Court and direct a restoration of the costs taxed in favor of the plaintiff and inserted in the judgment as originally entered.

The order of the County Court of Broome county should be reversed, with ten dollars costs and disbursements.

BOARDMAN, J., concurred; FOLLETT, J., concurred in result.

Order of the County Court of Broome county reversed, with ten dollars costs and disbursements.

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WILLETT FISHER, APPELLANT, v. THE VILLAGE OF  
CORTLAND, RESPONDENT.

*Practice—when the treasurer of a village is its chief fiscal officer within the meaning of section 3245 of the Code of Civil Procedure.*

Under the provisions of the charter of the village of Cortland (1864, chap. 406) the treasurer of the village, and not the common council thereof, is "the chief fiscal officer of the corporation" within the meaning of these words as used in section 3245 of the Code of Civil Procedure, which prohibits the allowance of costs to the plaintiff, in actions against municipal corporations, unless the claim upon which it is founded was, before the commencement of the action, presented to that officer (FOLLETT, J., dissenting.)

*Dressell v. The City of Kingston* (32 Hun, 526); *Bains v. The City of Rochester* (85 N. Y., 523), and *Judson v. The Village of Olean* (40 Hun, 158) followed.

APPEAL from an order made at the Cortland Special Term, denying the plaintiff's motion for a retaxation and for costs, after a judgment had been recovered by the plaintiff.

The action was brought to recover for personal injuries sustained by plaintiff in one of the streets of the defendant's village, and for the recovery of a sum of money only. Before the commencement of this action the plaintiff appeared before "the common council, while in actual session, and made a verbal statement of his injuries and claimed he ought to be paid something, but stated no amount. Being asked

what the amount was, he replied he could not tell. Two of the trustees, in an affidavit, said that the board concluded not to allow him anything; others of the trustees said that no claim was presented, and none was rejected." The Special Term held that "the claim of the plaintiff was never presented to the common council within the meaning of the statute." No claim was presented to the treasurer of the defendant before this action was commenced.

*Oliver Porter*, for the appellant.

*Fred. Hatch*, for the respondent.

HARDIN, P. J.:

In section 2 of chapter 406 of the Laws of 1864, is found a provision of defendant's charter providing for the election of a treasurer, and in section 16 of the same act it is provided, viz: "The treasurer shall receive all moneys belonging to said corporation, and disburse the same under the direction of the board of trustees; make and keep a correct record of all such receipts and disbursements; prepare at least two weeks before the annual election, and file with the clerk of the village, an account of the state of the finances of said village, and of the receipts and disbursements during the year, and at every time, when requested by the board of trustees, furnish them such statement in relation to the finances and the receipts and disbursements and debts, dues and demands of the said corporation, as the said board may, by resolution, demand; and perform such other duties as the said board of trustees may ordain." Section 21 of the act provides: "The trustees shall have the management and control of the finances." \* \* \* Section 39 of the act requires the collector of the taxes to pay over "all moneys collected by him to the village treasurer."

In *Dressell v. The City of Kingston* (32 Hun, 526), the court refers to chapter 150 of the Laws of 1872, for the purpose of determining whether the treasurer is the chief financial officer. The provisions found therein, in relation to the powers and duties of the treasurer of that city, are quite similar to the provisions we have quoted from defendant's charter. It was there held that the treasurer was the chief financial officer, and that, according to the provisions of section 3245 of the Code of Civil Procedure, a claim



should be presented to such officer before suit, to entitle plaintiff to have costs allowed him in case of a recovery in an action like the one before us. We regard that case as an authority directly in point, and consider it our duty to follow it. (See also *Baine v. The City of Rochester*, 85 N. Y., 523.) *Judson v. The Village of Olean* (40 Hun, 158) recognizes the authority of *Dressell v. Kingston* (*supra*), and, we think, supports the order now before us. In *Williams v. The City of Buffalo* (25 Hun, 302) it appeared "the action was for work done in building an engine-house for the city," and the right to costs was resisted because the claim had not been presented to the comptroller. The case is, therefore, not exactly in point, and it is probable that the case of *Baine v. The City of Rochester* (*supra*) had not been reported, and that the attention of the court was not called to the opinion of the Court of Appeals.

We are of the opinion the plaintiff did not make out a compliance with section 3245 of the Code of Civil Procedure, and therefore is not entitled to costs of this action.

The order should be affirmed, with ten dollars costs and disbursements.

FOLLETT, J., concurred.

BOARDMAN, J. :

The case of *Gage v. Village of Hornellsville* (41 Hun, 88), published since this opinion was written, is hostile to the view taken by Judge HARDIN. *Baine v. City of Rochester*, however, clearly holds that the power of the treasurer to audit and allow a claim, and provide means of payment, has nothing to do with the requirement of service of notice. The object was to secure notice, and the chief financial officer was named as the person on whom the notice should be served. The common council or board of trustees is not an officer or a financial officer, though they have various powers making a financial officer necessary. I must concur in the opinion.

Order affirmed, with ten dollars costs and disbursements.

GEORGE BENEDICT, RESPONDENT, v. THOMAS D.  
PENFIELD, APPELLANT, IMPLEADED, ETC.

*Practice — as to which party has the affirmative of the issue — evidence — hypothetical opinions inadmissible — when a verdict will be set aside because of the admission of irrelevant evidence.*

In this action, brought upon a bond dated January 24, 1881, given to a sheriff to indemnify him from all damages and costs that might be incurred, by reason of a levy and sale made by him, the answer did not admit the delivery of the bond.

*Held*, that as the plaintiff was bound to prove this fact, he had the affirmative of the issue.

*Lindsley v. European Petroleum Company* (3 Lans., 176) and *Millerd v. Thorn* (56 N. Y., 404) distinguished.

The defendant, having testified that he signed the bond in question upon the representations of one Risley that he (the defendant) was on a former bond, was asked by his counsel "would you have signed the bond if these representations had not been made to you."

*Held*, that the question was properly excluded.

Upon the trial the plaintiff, after proving that a bond or undertaking on appeal, dated September, 1882, was executed, was allowed to put the same in evidence, the objection of the defendant's counsel that it was incompetent and immaterial being overruled by the court:

*Held*, error; that as the evidence so admitted was irrelevant to the issues involved and might have prejudiced the defendant's case before the jury, and as the questions of fact upon which the decision of the case turned were sharply contested, the judgment should be reversed and a new trial granted.

APPEAL from a judgment entered on a verdict rendered at the Oneida Circuit, for the sum of \$3,237, and, also, from an order denying a motion for a new trial, made on the minutes of the justice before whom the action was tried.

The action was brought upon a bond of indemnity given to a sheriff to indemnify him against any loss or damages which he might sustain by reason of a levy and sale which he had made. The defense was that the defendant Penfield was induced to execute the bond by false and fraudulent representations made to him.

*William Kernan*, for the appellant.

*Beardsley & Beardsley*, for the respondent.

HARDIN, P. J. :

Plaintiff, to recover, was required to produce the bond and to establish its delivery by the defendant. Plaintiff was entitled to give evidence of its actual delivery to him, as he did testify, in addition to the production of the bond, upon the question of its actual delivery. CLIFFORD, J., says, in *Good v. Martin* (95 U. S., 96): "As the delivery is something that occurs subsequently to the execution of the instrument, it must necessarily be a question of fact when the delivery was made. Parol proof is, therefore, admissible to show when that took place." \* \* \* Defendant's answer did not admit the delivery of the bond. It was, therefore, incumbent upon the plaintiff to give such proof as would warrant a finding of the fact that it was delivered to the plaintiff. It was not error to hold that the plaintiff had the burden of proof and the affirmative of the issue. (*Huntington v. Conkey*, 33 Barb., 218; *Elwell v. Chamberlin*, 31 N. Y., 611.)

The case of *Lindsley v. European Petroleum Company* (3 Lans., 176) is unlike this, as in that case the making of the note, which includes its delivery, was admitted by the answer. *Millerd v. Thorn* (56 N. Y., 404) is unlike this case, as there the answer admitted the purchase of the goods sold, and set up an affirmative defense.

Defendant, as a witness, stated the circumstances and representations which induced him to sign the bond in question, and added: "I sign this new bond, relying upon these representations of Mr. Risley that I was on the former bond." Then he was asked by his counsel, viz.: "Q. Would you have signed the bond if those representations had not been made to you?" The question was objected to as incompetent and immaterial, and the court excluded it, and defendant excepted. If the jury found that the defendant told the truth, when he said that he relied upon the representations made, then it was immaterial to inquire what the defendant would not have done without the representations. ANDREWS, J., says, in *Taylor v. Guest* (58 N. Y., 266), "it is incumbent upon the party claiming to recover in an action for deceit, founded upon false representations to show that he was influenced by them." To that point the defendant had testified sufficient to bring his case, if believed, within the rule stated in the case just alluded to, and it was not error to exclude the question propounded, which, at most,

called for a hypothetical opinion. January 24, 1881, is the date of the bond in suit. It was acknowledged on the 31st day of January, 1881. Plaintiff testified he received it after it was acknowledged, "within a day or two after its date; received it from Mr. Penfield's own hands. It was acknowledged before I received it."

Upon the trial the plaintiff proved that a bond or undertaking, on appeal, executed by the defendant Thomas D. Penfield and another, was executed and dated September, 1882, and offered it in evidence. Defendant objected, as incompetent and immaterial, and his objections were overruled, and he excepted, and the undertaking was read in evidence, and by it the fact that defendant executed it was made to appear. We think the evidence was irrelevant to the issues. It did not legitimately bear upon any of the questions involved. It did not tend to show that the representations alleged, which induced the execution of the bond in suit, were not made. It did not tend to show that the defendant had signed a prior bond. It did not tend to show that defendant did not rely upon the representations which he says induced him to sign the bond in suit. (*People v. Bragle*, 88 N. Y., 585; *Green v. Disbrow*, 56 N. Y., 334.) It has been said that no evidence is admissible which does not tend to prove or disprove the issue joined. (3 Starkie on Ev., 387; 1 Green. on Ev., §§ 51, 52.)

This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principle fact or matter in dispute. (See *Townsend Mfg. Co. v. Foster*, 51 Barb., 346; S. C., affirmed, 41 N. Y., 620, and approved in *Green v. Disbrow*, *supra*.) Being irrelevant to the issues involved, it may have prejudiced the defendant's case before the jury. We cannot say that it did not influence the verdict. The error must be held sufficient to reverse the judgment, "unless it clearly appears the defendant was not prejudiced by the error." (*Starbird v. Barrons*, 43 N. Y., 204; *Green v. Disbrow*, *supra*.) The question of fact, upon which the case turned, was very sharply contested and involved in conflicting evidence, and the jury may have been influenced by the irrelevant evidence, to which reference has been made. (*Townsend Mfg. Co. v. Foster*, 51 Barb., 346.) Therefore, there should be a new trial.

BOARDMAN and FOLLETT, JJ.

We think the results of the trial were right, but concur with reluctance in granting a new trial, for the reasons stated by Brother HARDIN.

Judgment and order reversed, and a new trial ordered, with costs to abide event.

EARL E. ELLIS, RESPONDENT, v. JOHN E. SHARP, AS  
TRUSTEE OF SCHOOL DISTRICT No. 9, OF THE TOWN OF FABIUS,  
APPELLANT.

*Pleadings—what facts should be alleged in the complaint in an action by a school teacher against the trustees of the district.*

In this action, brought to recover wages alleged to be due to the plaintiff, as a teacher in the school district of which the defendant was the trustee, the complaint alleged that the plaintiff was employed by the defendant to, and did, teach the school in said district for the period of three months, and that the wages due to him therefor amounted to the sum of \$120, no part of which had been paid, and that the defendant had neglected and refused to pay the same. Upon an appeal from an order overruling a demurrer interposed to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action:

*Held*, that it must be assumed that the plaintiff was a qualified teacher, and that his services were solicited and contracted for, by and in behalf of the defendant, by a person authorized and empowered by law; that if the plaintiff was not qualified, the disqualifying facts should be alleged in the answer.

It was claimed that the complaint was defective because there was no averment in terms, of a refusal to give an order on the supervisor for public moneys, or of a refusal or neglect to collect any balance by tax.

*Held*, that the allegation that the defendant had "neglected and refused to pay" the wages was equivalent to such an averment.

That the plaintiff was not required to aver specifically that he had performed each act and duty required to be done and performed by him in the discharge of his duties as a teacher in the public schools, and that any failure on his part so to do should be set up in the answer as a defense.

APPEAL from an order and judgment overruling a demurrer to a complaint entered in Onondaga county.

The action was brought to recover wages alleged to be due to the plaintiff, as a teacher, at forty dollars per month, for three months, \$120.

*Waters & McLennan*, for the appellant.

*Fuller, Fuller & Cook*, for the respondent.

HARDIN, P. J.:

Plaintiff's complaint alleges that defendant was elected a trustee of the school district named, and being authorized and empowered by law, he employed the plaintiff to teach the school in said district, at a salary of forty dollars per month, for a term of three months, which employment and the terms thereof were accepted by the plaintiff. Then he alleges "that pursuant to said employment by the defendant, as trustee as aforesaid, the plaintiff entered upon the same, and taught the school in said district for the said period of three months, which term ended on or about the 19th day of December, 1884. That the wages of the plaintiff for his said services as teacher of aforesaid school amounted to the sum of one hundred and twenty dollars, no part of which has been paid, and the defendant, as trustee as aforesaid, although thereto requested, has neglected and refused to pay the same, or any part thereof, notwithstanding the said sum of one hundred and twenty dollars was due and payable on the 19th day of December, 1884, aforesaid." We think it must be assumed that the plaintiff was a qualified teacher, and that the services were solicited and contracted for, by and in behalf of the defendant, by a person authorized and empowered by law. All reasonable intendments are to be indulged in, in support of the pleading demurred to. (*Lorillard v. Clyde*, 86 N. Y., 385.)

If the plaintiff was not qualified according to the law in regard to being a recipient of public moneys, or in any regard to the collection by tax of his wages, the fact must be brought into the case by an answer. Section 42 of the school law (chap. 555 of 1864), as amended by chapter 406 of the Laws of 1867 (2 R. S. [7th ed.], 1166), does not, in terms, prohibit a district from employing a teacher not having the qualifications named in section 42 of the school law. It merely prohibits payment in the money apportioned to the district, and declares that such wages cannot be collected by tax. In *Dillaye v. Parks* (31 Barb., 132) it was held that when a disability does not appear upon the face of the complaint, if the defendant wishes to avail of it, he must set it up as a defense. In *Gilbert v. Sage*

(3 Lans., 287) it was held a defense that the sale of liquors was void, and that it must be set up in defense to be available.

It is urged that the complaint is defective, because there was no averment, in terms, of a refusal to give an order on the supervisor for public moneys (sub. 10, § 45, school law), and of a refusal or neglect to collect any balance by tax. But it is alleged that the defendant "has neglected and refused to pay" the wages earned. We think that allegation may be considered as equivalent to an averment that the defendant had refused to give a warrant upon the supervisor, and a refusal to collect by tax of the district.

It has been repeatedly held that school districts are *quasi* corporations, and trustees are officers of them, and that their acts bind the corporation when performed within their jurisdiction. (*Wait v. Ray*, 67 N. Y., 38; *Horton v. Garrison*, 23 Barb., 176). In *Silver v. Cummings* (7 Wend., 183) it was said "each school district has, when organized, a separate qualified corporate existence." In *Fister v. LaRue* (15 Barb., 324), JOHNSON, J., says of such a corporation, viz: "Having availed itself of the services, and received the benefits, it is bound, in conscience, to pay, and will not be heard to say that the original agreement was not made by a person legally authorized to contract."

Section 44 of the school law (2 R. S. [7th ed.], 1166) provides that teachers shall keep school lists and accounts of attendance. By section 53 of the act, it is made the duty of trustees to provide a book therefor, and each teacher is required to verify the entries by his oath. It must be assumed the teacher performed his duty in that regard. It is provided that until such entries have been made and verified "the trustees shall not draw on the supervisor for any portion of his wages." (2 R. S. [7th ed.], 1159, § 53.)

If the defendant is able to establish the fact that its refusal to give a warrant or order upon the public fund was because of an omission of duty by the plaintiff, it should aver that as a defense. We do not think plaintiff was required to aver specifically each act, step and duty done under the contract for wages. A trustee has no power to contract for unqualified teachers. (*Gillis v. Space*, 63 Barb., 178.) The demurrer admits the contract was made with the plaintiff, and that he performed the services named. It is, there-

fore, most reasonable to assume that defendant did its legal duty. (*Lorillard v. Clyde, supra.*)

Our attention is directed to *Baker v. The City of Utica* (19 N. Y., 3-6). That was an action of a city surveyor for services, which were included in assessments made for the expenses of certain local improvements, which assessment the city was proceeding to collect, but they had not been collected when the action was begun. It was then held that the charter provided "a peculiar mode of compensation for his services," and that he was bound by that mode. We think the case does not sustain the contention of the appellant. We reach the conclusion that the complaint before us states facts sufficient to constitute a cause of action, and that the defendant must bring in any defense it may have by answer.

The judgment should be affirmed, with costs, and leave given to defendant to withdraw the demurrer and answer in twenty days, upon payment of costs of the demurrer and of this appeal.

BOARDMAN and FOLLETT, JJ., concurred.

Interlocutory judgment affirmed. with costs, and leave given to the defendant to withdraw the demurrer and answer in twenty days, upon payment of the costs of demurrer and of this appeal.

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CHARLES E. HUBBELL, AS RECEIVER OF THE SYRACUSE IRON WORKS, RESPONDENT, v. THE SYRACUSE IRON WORKS, GILES EVERSON AND OTHERS, APPELLANTS.

*Action by the receiver of a corporation to determine the validity of bonds claimed to be secured by a mortgage on its property — when it can be maintained.*

The plaintiff, who had been appointed the receiver of the Syracuse Iron Works, in an action brought for the sequestration of its property under section 1784 of the Code of Civil Procedure, brought this action in January, 1886, to determine which of the bonds which had been issued by the iron works were secured by a mortgage for \$100,000 issued by it, and which bonds should be excluded from sharing in the proceeds arising from the foreclosure of the mortgage; what bonds should be adjudged to belong to Charles B. Everson, which were not held by him, and what, if any, should be adjudged to be surrendered up by the present holders, and for such other relief as should be incident thereto.



In November, 1884, the trustee, to whom the mortgage was given, had commenced an action to foreclose it. In February, 1885, one Giles Everson had commenced an action in his own behalf, and in behalf of all the other stockholders of the company, to compel the application of the bonds to the purposes of the trust. The validity of the mortgage was not disputed by the plaintiff, but some of the bonds, which are claimed to be secured thereby, are alleged to be invalid and to have been diverted from the purposes for which they were given, and to have been used to pay debts not existing when the mortgage was executed and delivered.

*Held*, that the plaintiff, as the receiver of the corporation, was entitled to bring and maintain the action.

*Whitney v. New York and Atlantic Railroad Company* (32 Hun, 178); *Supervisors of Saratoga County v. Deyoe* (77 N. Y., 219); *Sams v. Seabury* (11 Abb. N. C. 461; *McHenry v. Hazard* (45 N. Y., 581).

APPEAL by the defendants Everson from an interlocutory judgment overruling a demurrer interposed to the complaint.

The plaintiff was appointed a receiver of the defendant, the Syracuse Iron Works estate, in an action for the sequestration of its property, brought at the suit of R. N. Gere under the provisions of section 1784 of the Code of Civil Procedure.

An order was made in that action directing the plaintiff to commence an action in equity to determine what bonds issued by the Syracuse Iron Works, claimed to be secured by a mortgage of \$100,000, were secured by said mortgage, and what of said bonds should be excluded from sharing in the proceeds arising from the sale of the property covered by the mortgage, and what of the same not then held by Charles B. Everson should be adjudged to belong to him, and what, if any, should be adjudged to be surrendered up by the present holders thereof. This order was made June 14, 1885.

The iron works, in January, 1883, had made the \$100,000 mortgage, and issued bonds to that amount to Alfred Wilkinson, Jr., in trust to pay the debts of the mortgagor to the amount thereof by delivering the bonds directly to the creditors, or selling the bonds and paying the avails to the creditors.

In November, 1884, the mortgagee commenced an action to foreclose the mortgage. Several creditors were made parties to such foreclosure action and have answered, and conflicting claims are made in that action as to what bonds are secured by the mortgage and entitled to be paid from the proceeds of the sale; one claim being that a large amount of the bonds were transferred

to the president of the iron works, and to the other officers thereof, after the iron works was insolvent, contrary to the statute, and are not valid or secured by the mortgage; that, to the extent of \$59,000, they were issued in payment of illegal preferences, and are not valid or secured by the mortgage; and that others were issued to pay debts not existing at the time the mortgage was given, and are not, therefore, valid or secured by the mortgage; and many of the bonds so improperly and illegally issued, disposed of and delivered, are not valid and not secured by the mortgage, but what amount cannot be stated. About February, 1885, Giles Everson, a stockholder, for himself and others, commenced an action in this court against the iron works and others to compel the Robert Gere Bank, defendant therein, to surrender up \$7,500 in amount of the bonds, and the Merchants' National Bank of Syracuse to surrender up in like manner \$40,000 in amount of the bonds claimed to be held by them, respectively, and secured by the mortgage, but which the plaintiff in that action claimed did not belong to them and were not secured by the mortgage; and asking, also, that the assignee of "Wilkinson & Co." in like manner surrender up \$9,500 in amount of the bonds, and the \$36,000 of indebtedness of the iron works to John Urouse & Co., be first paid out of the proceeds of the sale of the mortgaged property. Answers have been interposed in such action and conflicting claims are interposed to the bonds in question.

*M. M. Waters*, for the appellants.

*H. A. Maynard*, for the respondent.

HARDIN, P. J. :

According to *Whitney v. New York and Atlantic Railroad Company* (32 Hun, 173), a receiver appointed of a corporation has "all the powers and authority conferred, and is subject to all the duties and liabilities imposed upon a receiver appointed (upon) the voluntary dissolution of a corporation." (Code of Civil Pro., § 1788.) Such a receiver is entitled to "the property real and personal, things in action, contracts and effects of the corporation so far as they were owned by it at the time of the appointment. In that case it was said that the receivership could not include that which was legally

included in a mortgage, but the creditor's receivership must be confined to the property not covered by the mortgage. But there was no question about the validity of the mortgage. Not so in the case before us. The extent of the mortgage is disputed, and some of the bonds secured by the mortgage are alleged to be invalid. To the extent that the mortgage and bonds are valid, the owners have the paramount right. (*Whitney v. N. Y. and Atlantic R. R. Co.*, *supra*, 175.) Indeed, we do not understand the plaintiff to claim to the contrary, but he seeks to have it ascertained and determined to what extent the mortgage and bonds are valid and effectual as a lien upon the property that came to his hands as receiver. The mortgage and bonds were executed to secure or pay debts. It is averred that some of the bonds have been diverted from that purpose and used to pay debts "not existing when said mortgage was made and delivered." It is averred that the mortgage was made "covering all and singular the franchises, rights, privileges and liabilities, corporate or otherwise, of and belonging to said iron works which then were, or at any time thereafter might be owned, held, possessed, used or enjoyed by it," and also all and singular its real estate," etc.

We find no averment that any of the mortgaged property has been sold. It is therefore inferable or presumable that all of it remains and was owned by the company when plaintiff was appointed receiver, and that he as such is interested in the proper application and distribution of it, and that he is interested to protect it from invalid liens for the benefit of his *cestui que trusts*.

It is alleged that the Eversons, who demur and appeal, claim with others to be "the owners and holders of the bonds of said iron works which they severally claim are secured by said mortgage." It seems to us that they are proper parties to this action, and that the plaintiff cannot have the validity of the mortgage, and the extent of the indebtedness which is valid, ascertained and determined without the presence of all the parties having the bonds issued under the mortgage. It is apparent that the plaintiff has alleged that the mortgagor owned some if not all of the mortgaged property when the receiver was appointed. Being a corporation it must be assumed, in the light of the averments of the complaint, that it owned its own "franchises and right, and property." The

receiver represents the corporation, its stockholders and creditors. (*Atty. Gen. v. Mut. Ins. Co.*, 77 N. Y., 275.)

Taking all the facts found in the complaint, it cannot be said that they do not warrant some relief in equity, and in such cases the complaint must be sustained. (*Brinkerhoff v. Brown*, 6 Johns. Ch., 139; *Prindle v. Caruthers*, 15 N. Y., 425; *Weeks v. Cornwall*, 39 Hun, 643.)

It is allowable to a receiver to have an action to set aside illegal transfers or incumbrances created by the officers or by the corporation, and it is proper to stay an action brought by a creditor to enforce such debts or liens as are invalid or illegal. (*Atty. Gen. v. Mut. Life Ins. Co.*, 77 N. Y., 272.)

We are of the opinion that the demurrer was properly overruled. Judgment and order affirmed, with costs, and leave given to appellants to answer in twenty days upon payment of the costs of the demurrer and of this appeal.

FOLLETT, J., concurred.

BOARDMAN, J. :

I concur, and would cite the following cases as in my judgment sustaining the decision: *Supervisors of Saratoga County v. Deyoe* (77 N. Y., 219); *Same v. Seabury* (11 Abb. N. C., 461); *McHenry v. Hazard* (45 N. Y., 581).

Interlocutory judgment and order affirmed, with costs, and leave given to appellants to answer in twenty days upon payment of costs of demurrer, and of this appeal.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENTS, v. CALVIN KING, APPELLANT.

*Oil rights — an owner of a skating rink refusing to sell tickets to a colored person is guilty of a misdemeanor — Penal Code, sec. 383.*

Upon the trial of the defendant, one of the owners of a skating rink, upon an indictment charging him with a misdemeanor in refusing to sell to three colored persons tickets of admission on a certain evening when a large number of per-

sons were admitted thereto for the purposes of amusement and as spectators, he was convicted and sentenced to pay a fine of \$50.

*Held*, that the judgment should be affirmed; that the skating rink was "a place of amusement" within the meaning of that term as used in section 383 of the Penal Code, and that that section was constitutional.

APPEAL from a judgment of the Court of Sessions of Chenango county convicting the defendant of a misdemeanor.

*E. H. Prindle*, for the appellant.

*George A. Haven*, district attorney, for the respondent.

BOARDMAN, J. :

The defendant, who is one of the owners of a skating rink, refused to sell to three colored persons tickets of admission on a certain evening when a large number of persons were admitted thereto for the purpose of amusement and as spectators. The refusal was upon the sole ground that such applicants were colored. For this act the defendant was indicted, tried, convicted and sentenced to pay a fine of \$150, etc.

The jury, under the charge, has found that the skating rink was a place of amusement such as is contemplated in section 383 of the Penal Code; that the defendant was the owner or manager of the rink, within the statute, and that he excluded Breed, Wyckoff and Robbins from said rink by reason of their color. These conclusions cannot be subjects of doubt irrespective of the verdict. An attempt is made to argue that a refusal to sell those parties tickets is not an exclusion of them from the rink; but we think the objection hypercritical and untenable. It may, however, have properly been submitted to the jury to determine, as was done, and in that case the verdict of the jury would conclude us.

The case, upon the facts, is then brought directly within section 383 of the Penal Code, and the conviction is right, if that section of the Code is binding as law. It is claimed that the section is unconstitutional. On a question of so much gravity the briefs of counsel are very lean. The appellant cites the dissenting opinion of Mr. Justice FIELD, in *Munn v. Illinois* (94 U. S., 149), and *The People ex rel. King v. Gallagher* (11 Abb. N. C., 187). The respondent's counsel cites no authority whatever. It is claimed

that the section is void because it prescribes that a skating rink, owned as private property, shall be devoted to the use of colored people. But that is not a just statement. The law gives to every citizen certain civil rights from which he shall not be excluded by reason of his race or color. His rights to the equal enjoyment of such accommodations, facilities or privileges as are furnished by inn-keepers or common carriers, or by owners or managers of theaters or other places of amusement are among the number. The owner of property has devoted it to a purpose in which the public has an interest. For a consideration the public are admitted to its enjoyment. On payment of a reasonable compensation citizens are entitled to its use without distinction by reason of race or color. The privilege may be withdrawn by discontinuing the use: (*Munn v. Illinois*, 94 U. S., 113.) The rule of the legislative rights has been sanctioned in case of railroads. (*Cent. R. R. v. Green*, 86 Penn. St., 421; *Railroad Company v. Brown*, 17 Wall., 446.) In *The People ex rel. King v. Gallagher* (93 N. Y., 438) it was held by a divided court that the city of Brooklyn had a special law by which separate schools for colored children were provided, and that such special law was not abrogated by chapter 863 of Laws of 1873. A colored man may not be excluded from jury duty. (*Ex parte Virginia*, 100 U. S., 339; *Strauder v. West Virginia* (Id., 308.) But the Penal Code (§ 383) does not infringe upon the United States Constitution or laws. It carries the principle too far, as this defendant now claims, and deprives the owner of the free use of his own property. That, however, is a power inherent in every sovereignty. The sovereign power may regulate the use of one's property with reference to the public welfare. Under the Constitution and laws we may fairly say that no discrimination may be allowed against colored people in the use of certain property of a public or quasi public character. Places of amusement are made such property by the Penal Code. The legislature possessed the power to control and regulate property held for public use; and the authority exercised in the present case does not seem to us to deprive the owner of his property, or of its use, so as to be obnoxious to the restraints of article 5 of the amendments of the Constitution of the United States, or of section 1, article 1 of the Constitution of this State. It is simply a rule

of conduct as to its use. Numerous cases of somewhat similar legislation will readily occur to their mind.

The appeal papers do not show a judgment in due form from which an appeal could be taken. But, as the elements of a judgment are there, we have thought best to consider the case on its merits and as if on an appeal from a regular judgment.

For the reasons stated we think the conviction and judgment should be affirmed.

HARDIN, P. J., concurred ; FOLLETT, J., not voting.

Conviction and judgment affirmed.

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PETER PHILLIPS, RESPONDENT, v. SARAH PLATO,  
APPELLANT.

*Accommodation indorser — when he cannot compel the guarantor of a note to contribute.*

G. H. Plato, the defendant's son, offered a note made by himself and indorsed for his accommodation by the plaintiff, to one Olney in payment of an indebtedness due to him. Olney having refused to accept it unless the defendant's signature was procured, the defendant, with full knowledge of the facts, executed on the back of the note, above the plaintiff's signature, an absolute guaranty of the payment of the note. The note was delivered to Olney. The plaintiff had no knowledge of or participation in the procuring of the defendant's guaranty. The plaintiff, having been compelled to pay the note, brought this action against the defendant as a guarantor, claiming that she, as a co-surety for the principal debtor, G. H. Plato, who was insolvent, was liable to contribute one-half of the amount the plaintiff had been compelled to pay.

*Held*, that the action could not be maintained.

*Harris v. Warner* (18 Wend., 400); *Belloni v. Freeborn* (63 N. Y., 388) followed; *Wells v. Miller* (66 id., 255) distinguished.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action at the Oneida Special Term.

J. P. Olney, for the appellant.

Bentley & Jones, for the respondent.

BOARDMAN, J.:

This is an appeal from a judgment upon a decision by the court without a jury. The action was upon a guaranty of payment of a promissory note, for the amount of the note. The complaint was amended on the trial so as to constitute an action by plaintiff, as indorser, who had paid the note, against the defendant who had guaranteed its payment, for one-half of the amount paid.

G. H. Plato, defendant's son, was indebted to one Olney, and to pay the same made this note and procured the plaintiff to indorse it. It was then offered to Olney, who refused to accept it unless G. H. Plato would procure the defendant's signature. Soon after the defendant, with full knowledge of the facts, executed on the back of the note over plaintiff's indorsement an absolute guaranty of the payment of the note. The note was then delivered by G. H. Plato to Olney. When it became due it was dishonored, and plaintiff paid it. He now brings this action against the guarantor, and claims that she, as a co-surety for G. H. Plato, the principal debtor, is liable for contribution, and a recovery for one-half of the amount paid by plaintiff is given against the defendant G. H. Plato is insolvent. The plaintiff had no knowledge of or participation in the procuring of defendant's guaranty, nor did he require it.

It is plain that the defendant's guaranty was given without consideration and as an accommodation to her son, the principal debtor. By the instrument she became absolutely liable to pay the debt. She did not assume this liability at the request or in the interest of the plaintiff. Indeed, his position as indorser was complete before the necessity of any other security became known. He, doubtless, supposed the creditor would accept the note with his indorsement alone. The defendant knew these facts, and signed for the purpose of giving to the note, as it then existed, the security of her name. In the language of TALCOTT, P. J., in *Deck v. Works* (18 Hun, 266-272), "the guarantor of a note on which there is a prior indorsement, undertakes for the performance of each contract which he has guaranteed, that of the maker and that of the indorser. If either fails to perform the contract which is guaranteed, a cause of action arises to the holder of the guaranty for such default." As a corollary, it must be true that if either the maker or indorser shall pay the note the guarantor's liability ceases.



Again, until the note had been indorsed by the plaintiff it had no commercial or negotiable existence. When it was so indorsed its use was followed by liability; but before such indorsement it was incapable of being used to create an obligation. When the note was presented to defendant it was complete and perfect in its form. Such perfect and complete note she guaranteed payment of. It has been paid by the parties to it, or one of them. That is what she agreed should happen, and her obligation is at an end. There is no reason to believe the plaintiff required or expected defendant to sign the note as his co-surety, or for his protection in whole or in part. Her signature was placed there with the purpose of becoming, in effect, a second indorser, but was modified because she was a married woman. The difference between an indorser and guarantor is slight. The former becomes liable on condition of notice of dishonor if the note is not paid by the maker when due; the latter becomes absolutely liable to pay if the note is not paid when due. (*Brown v. Curtiss*, 2 N. Y., 230; *McMurray v. Noyes*, 72 N. Y., 523, 525.) The defendant, by her guaranty made under the circumstances of this case, became the surety of the maker and indorser. She did not intend to become the co-surety of the plaintiff and equally liable with him for the debt, but only for his default. In this respect the case is brought within *Harris v. Warner* (13 Wend., 400); *Belloni v. Freeborn* (63 N. Y., 383, 388). No importance is attached to the position of the guaranty above plaintiff's indorsement upon the note.

For these reasons we are constrained to differ with the learned judge who decided this case below. Nor do we think the case of *Wells v. Miller* (66 N. Y., 255) is controlling, although the decision was mainly founded upon it. The parties to that action were in fact sureties for the principal debtor and both signed the note beneath his signature. The question was whether the plaintiff, who was a partner of the debtor, had not so acted as to deceive the defendant into the belief that he was signing as surety for both the partners, and hence not entitled to contribution in equity. No such question is presented in the present case. This is an action by an indorser against a guarantor, where the purposes and intent of the parties, their mutual relations to each other, to the note and its maker, the possible liabilities of each and the actual liability of the

defendant, after payment of the note by plaintiff, are open for consideration. In *Wells v. Miller (supra)*, the court considers only whether contribution should be enforced between actual and recognized co-sureties in equity, by reason of the peculiar facts in the case.

The judgment should be reversed and a new trial granted, costs to abide the event.

FOLLETT, J., concurred.

HARDIN, P. J.:

Plaintiff's contract of indorsement was made without reference to the defendant; it was to pay if the maker did not and the holder gave notice of the dishonor.

Defendant's undertaking was that if the note was not paid by the maker or indorser, she would pay it. (*Moakley v. Riggs*, 19 Johns., 69.) The indorser has paid it. He has no more claim upon the defendant than though she had in form, as was her intent (aside from binding herself as a married woman), become a second indorser. I concur.

Judgment reversed and new trial ordered, with costs to abide the event.

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ANNA M. O'DOUGHERTY, RESPONDENT, v. REMINGTON  
PAPER COMPANY, APPELLANT.

*Admeasurement of dower — question as to whether a specific parcel of land can be set aside — at what time and in what manner it must be determined — the rights of all the parties must be considered — Code of Civil Procedure, sec. 1619.*

In this action, brought to recover dower in certain real estate claimed to be owned by and to be in the possession of the defendant, defenses were interposed, to hear, try and determine which a reference was ordered. In the pleadings there was no issue joined as to the practicability of an actual admeasurement of a specific portion of the land to the plaintiff for her dower, the only allusion thereto being in the alternative relief demanded in the plaintiff's prayer for judgment. Upon the trial the referee, against the objection and exception of the defendant, received evidence tending to show that the property was so situated that a distinct parcel could not be admeasured to the plaintiff without injury to her rights, and upon the evidence so received found that a distinct parcel of the property could not be admeasured to the plaintiff without material injury to her interests, and directed that the premises be sold.

*Held*, that the question of the practicability of an actual admeasurement of the plaintiff's dower was not one to be tried by the referee, and that the direction for the sale of the property being unauthorized should be stricken from the report.

Although, in the case of a trial by the court, the question of actual admeasurement of dower might be investigated and decided so that the rights of the parties, and the necessity of a sale and the interlocutory judgment, could all be determined on a single hearing, yet this course could seldom be pursued as the feasibility of an actual partition could not generally be denied without a visible examination of the lands by the court, referee or commissioners, and for the further reason that as the possibility of an actual partition might often greatly depend upon the rights of the several parties, as determined on the trial, the question could not be intelligently considered until such determination had been made.

In all cases (except, perhaps, when the trial is by the court, which finally orders the interlocutory judgment), a reference must be had to ascertain whether actual admeasurement or partition can be made, after a decision of the referee as to the rights of the parties under the issue and before the judgment declaring such rights is entered.

In order to authorize a sale of the property it must be shown that a distinct parcel of the property cannot be admeasured and laid off to the plaintiff, as tenant in dower, "without material injury to the interests of the parties." It is not sufficient to show that one of the parties would be injured by an actual partition.

MOTION by the defendant for new trial after the entry of an interlocutory judgment under section 1001 of the Code of Civil Procedure, and also an appeal by the defendant from an order refusing to appoint a referee to admeasure dower to plaintiff in the lands described in the complaint.

The action was brought by plaintiff, as widow of one Patrick O'Dougherty, deceased, to recover dower in land which he had owned during coverture. This land had been sold upon execution sale against Patrick during his lifetime, and had been purchased by and was in the possession of defendant. After the commencement of the action the plaintiff duly made and filed her consent, in writing, to accept a gross sum in satisfaction of her dower right, under the provisions of section 1617 of the Code of Civil Procedure. The defendant's answer admitted plaintiff's right to recover dower, but it sought to counter-claim, against plaintiff's dower interest, various mortgages and judgments, which the defendant alleged it held against plaintiff. The cause was referred to a referee, to hear, try and determine the same, and all the issues therein. Upon the

trial the referee, under the objection of defendant, received evidence that the property was so situated that a distinct parcel could not be admeasured and laid off to plaintiff, as tenant in dower, without injury to her rights, and upon this testimony so found in his report. The referee directed that before entry of an interlocutory judgment a reference be had, under section 1621 of the Code, to ascertain whether any person not a party had a lien upon the property, and upon the coming in of such report that an interlocutory judgment of sale be entered. The defendant thereupon applied at Special Term for the appointment of a referee to admeasure plaintiff's dower, which application was denied. A reference was had, in accordance with the decision of the referee, to ascertain whether any person, not a party, had a lien on the premises, and upon the coming in of the referee's report it was confirmed, and interlocutory judgment was entered. The defendant appealed from the order denying the application for the appointment of a referee to admeasure plaintiff's dower, and makes a motion for a new trial at the General Term, under section 1001 of the Code of Civil Procedure.

*Elon R. Brown*, for the appellant.

*O'Brien & Emerson*, for the respondent.

BOARDMAN, J. :

This action was brought to recover dower in certain real estate claimed to be owned by and in the possession of the defendant. Defenses were interposed and a reference had to hear, try and determine the same. In the pleadings there is no issue joined as to the practicability of an actual admeasurement of a specific portion of the land to plaintiff for her dower. The only allusion thereto is in the alternative relief demanded in plaintiff's prayer for judgment.

We, therefore, conclude it was not a matter to be tried under the order of reference, and that the evidence offered and admitted should have been rejected. Such error, however, need not involve an entire new trial. The interlocutory judgment must be reversed, and the fourth finding of law be stricken from the report, as unauthorized and unwarranted. The defendant's exception to this third conclusion of law must be sustained.

It follows, as a consequence of this decision, that the court has not been legally shown "that a distinct parcel cannot be admeasured and laid off," as is required by section 1619 of the Code, before it may, by judgment, direct the property to be sold at public sale. Undoubtedly, in case of a trial by the court, the question of actual admeasurement of dower could be investigated and decided, so that the rights of the parties and the necessity of a sale and the interlocutory judgment could all be determined on a single hearing. The course we apprehend could not often be practical, since the feasibility of an actual partition could not generally be denied without a visible examination of the lands by the court, referee or commissioners. Indeed the possibility of an actual partition might often greatly depend upon the rights of the several parties as decided by the referee on the trial, and until such rights were so determined the question could not be intelligently considered. We think, therefore, that the practice requires in all cases, except, perhaps, where the trial is by the court which finally orders the interlocutory judgment, a reference to ascertain whether actual admeasurement or partition can be made, after a decision of the referee as to the rights of the parties under the issue, and before the judgment declaring such rights.

The sixth finding of fact does not conform to the requirements of section 1619, in that it does not find and decide "whether a distinct parcel of the property can be admeasured and laid off to the plaintiff, as tenant in dower, without material injury to the interests of the parties." It is not sufficient that one of the parties would be injured by an actual partition. The rights of all parties are to be looked after and protected, and if a division of the land cannot be made without material injury to the interests of all the parties, a sale may be had. Here there is an especial reason why a sale should not be ordered if it can reasonably and fairly be avoided. The plaintiff has a very slight interest in a property of very considerable value given to it by improvements made by defendant, in which plaintiff has no dowerable interest. The defendant has considerable claims by way of judgment against the plaintiff, which should be paid out of plaintiff's interest in these lands or otherwise. The plaintiff is insolvent. A sale might result in a serious injury to a manufacturing industry and to defendant's stockholders, without

corresponding advantage to plaintiff. The defendant, therefore, has a right to demand that its interests, as well as plaintiff's, should be considered before a sale is ordered of the lands in question.

We conclude that the interlocutory judgment should be reversed, and that the Special Term proceed to appoint a referee or commissioner to ascertain whether plaintiff's dower can be admeasured by actual partition. The defendant should have costs of this appeal to be paid by plaintiff.

For the same reasons it follows that the order denying defendant's motion for the appointment of a referee or commissioner to admeasure plaintiff's dower, or to ascertain whether it could be admeasured, should be reversed and said motion granted, and the court at, Special Term, will appoint such referee or commissioner under these decisions, upon due and proper notice. No costs are allowed upon the appeal from the order.

HARDIN, P. J., and FOLLETT, J., concurred.

Interlocutory judgment reversed, and Special Term directed to proceed and appoint a referee or commissioners, to ascertain whether plaintiff's dower can be admeasured by actual partition. Costs of appeal allowed defendant, to be paid by plaintiff. Also, order reversed and motion granted, and the Special Term directed to appoint a referee or commissioners, upon proper notice and application therefor, without costs on appeal from the order.

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THE PEOPLE OF THE STATE OF NEW YORK *EX REL.*  
ELIZA MILLER, APPELLANT, *v.* ALLEN COOPER, SHERIFF  
OF THE COUNTY OF CHEMUNG, RESPONDENT.

*Charter of the city of Elmira — 1875, chap. 370 — over what offenses exclusive jurisdiction is conferred on the recorder.*

Under the charter of the city of Elmira (chap. 370 of 1875) the recorder has exclusive jurisdiction to try one accused of keeping a disorderly house, subject to the right of such person to apply for a certificate directing that she be prosecuted by indictment, pursuant to sections 57 and 58 of the Code of Criminal Procedure.

APPEAL from an order remanding the relator to the custody of the sheriff, after a hearing upon the return to a writ of *habeas corpus*.

March 12, 1886, the recorder of the city of Elmira issued a warrant charging the relator with "keeping a disorderly house," which is a misdemeanor, "punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both." (Penal-Code, § 15.) March 13, 1886, she was arrested by virtue of the warrant and taken before the recorder, whereupon she pleaded not guilty, waived an examination and demanded a trial by jury after indictment, and offered bail, which was refused upon the ground that the recorder had exclusive jurisdiction to try the defendant. Thereupon the recorder adjourned the trial until March 19, 1886, and in default of bail to appear for trial she was committed to jail.

The relator obtained a writ of *habeas corpus* from the county judge and sought to be discharged, upon the ground that she had a right to give bail for her appearance to answer to an indictment, and, therefore, was illegally imprisoned. The county judge held that the recorder had exclusive jurisdiction to try the relator for the offense charged, and remanded her to the custody of the sheriff, from which order the relator appeals.

*Charles A. Collin*, for the relator, appellant.

*Edgar Denton*, district attorney, for the respondent.

FOLLETT, J.:

The recorder of the city of Elmira is authorized to hold Courts of Special Sessions and exercise the powers and jurisdiction of such courts, as regulated by statute. (Laws 1875, § 104, chap. 370; Elmira City Charter; Code Crim. Pro., § 63.) The offense with which defendant is charged not being enumerated in section 56 of the Code of Criminal Procedure, the recorder has not exclusive jurisdiction under that section. Subdivision 33 of that section does not bring the case within the exclusive jurisdiction of the recorder, unless exclusive jurisdiction is given him by some special statute or municipal ordinance authorized by statute. Exclusive

jurisdiction of the offense charged is not claimed under any municipal ordinance, but is claimed under the city charter, and especially under section 104 thereof.

Section 4 of the charter provides that there shall be three justices of the peace within the city, and section 44 provides: "§ 44. The justices of the peace of the said city shall have and exercise all the powers, authority and jurisdiction, and discharge all the duties, and be entitled to the fees and compensation of justices of the peace of the several towns in this State, except as modified by this act."

Section 104 provides: "§ 104. The recorder of the city shall, except in case of his absence therefrom, or inability, from sickness or other cause, to act, have jurisdiction exclusive of any justice of the peace or other officer therein, except judges of courts of record, to issue all criminal process, and to institute all criminal proceedings, which a single justice or two justices of the peace in towns are empowered or directed by law to issue and institute; to hear and entertain all complaints and conduct all examinations in criminal cases and proceedings; to hold courts of Special Sessions, with all the powers and jurisdiction of such courts as regulated by statute; to try, convict and sentence all persons who may be guilty of any offenses which are or may be triable by Courts of Special Sessions, and to commit for trial all persons who shall be charged or be guilty of any offense not triable in said court. The Court of Special Sessions, held by said recorder, shall have jurisdiction of and power to hear and determine all charges for every misdemeanor committed or charged to have been committed within said city." \* \* \*

"Said recorder shall have the power to let to bail persons charged with crime before him in all cases of felony where the imprisonment in the State prison, on conviction, cannot exceed five years." \* \* \*

"The said recorder shall have and possess the exclusive jurisdiction of all the offenses within said city specified in this section, except as hereinbefore stated."

The sentence last quoted is very broad. No specific offenses are mentioned in the section, but offenses are classified as felonies and misdemeanors. In felonies the recorder is given power to take



examinations, and let to bail when the punishment, on conviction, cannot exceed imprisonment for five years in a State prison, which are the only offenses excepted from the exclusive jurisdiction of the recorder.

Section 106 of the charter provides: "In case of sickness, absence from the city, disability or inability to act, of the said recorder, his powers and duties are hereby conferred and imposed upon either of the several justices of the peace of said city so designated, except that such justices shall not have jurisdiction to try any person for any offense not heretofore triable by Courts of Special Sessions."

When this charter was passed, the policy of conferring exclusive jurisdiction upon Courts of Special Sessions, to try specified misdemeanants, had been established. (Laws 1857, chap. 769; Laws 1866, chap. 467; Laws 1872, chap. 530.) The sentence in the section last quoted, "except that such justices shall not have jurisdiction to try any person for any offense not heretofore triable by Courts of Special Sessions," conveys the idea of a broader jurisdiction in the Court of Special Sessions, when presided over by the recorder, than when presided over by a justice of the peace, and if such was not the legislative intent, it is difficult to see why these words of limitation were inserted.

The language of the charter of the city of Elmira is much broader than the language in the charter of the village of Hornellsville, and the case of *The People v. McDonald* (26 Hun, 156) does not support the contention of the relator. We are of the opinion that the recorder had exclusive jurisdiction to try the relator for the offense charged, subject to her right to apply for a certificate, directing that she be prosecuted by indictment, pursuant to sections 57 and 58 of the Code of Criminal Procedure.

The order of the county judge is affirmed.

HARDIN, P. J., and BOARDMAN, J., concurred.

Order affirmed.

CHARLES E. HUBBELL, AS RECEIVER, ETC., OF THE SYRACUSE IRON WORKS, RESPONDENT, v. THE MERCHANTS' NATIONAL BANK OF SYRACUSE, APPELLANT.

*Practice*—the grantor must be made a party to an action to set aside a conveyance as fraudulent.

This action was brought by the plaintiff, who had been appointed a receiver of the Syracuse Iron Works in a creditors' action, brought under section 1784 of the Code of Civil Procedure, to set aside as fraudulent a judgment in favor of the defendant, entered upon an offer made by the Syracuse Iron Company, in an action brought against it by the defendant, and to recover the value of the chattels sold under an execution issued on the said judgment.

*Held*, that a demurrer, interposed upon the ground that there was a defect of parties defendant, because of the non-joinder of the Syracuse Iron Works, should be sustained.

The rule is settled that in actions to set aside fraudulent conveyances, the alleged fraudulent grantor is a necessary party defendant.

*Miller v. Hall* (8 J. & S., 262; affirmed, 70 N. Y., 250) followed; *The Attorney General v. The Guardian Mutual Life Insurance Company* (77 N. Y., 272) distinguished.

APPEAL from an interlocutory judgment, entered on an order overruling a demurrer to the complaint interposed by the defendant.

*Henry A. Maynard*, for the respondent.

*Forbes, Brown & Tracy*, for the appellant.

FOLLETT, J. :

October 7, 1884, the Merchants' National Bank sued the Syracuse Iron Works on its promissory notes. On the same day the Syracuse Iron Works appeared in the action and made an offer of judgment, which was accepted, and a judgment entered pursuant to section 738 of the Code of Civil Procedure. On the same day (October seventh) an execution was issued on the judgment to the sheriff of Onondaga county, who, on the same day, levied on chattels of the Syracuse Iron Works, and October 14, 1884, sold them under the execution. October 7, 1884, the plaintiff was appointed, and October 8, 1884, qualified as temporary receiver of the Syracuse Iron Works, in a creditors' action brought under section 1784 of the Code of Civil Procedure, and December 9, 1884, he was appointed

permanent receiver by a final judgment in the creditors' action, pursuant to section 1788 of the Code of Civil Procedure.

The receiver brings this action to set aside, as fraudulent, the judgment of the Merchants National Bank and to recover from it the value of the chattels sold under the execution. The defendant demurred, upon the ground that there was a defect of parties defendant, because of the non-joinder of the Syracuse Iron Works.

The case of *Miller v. Hall* (8 J. & S., 262; affirmed, 70 N. Y., 250), reviews the conflicting decisions, and settles the rule that in actions to set aside fraudulent conveyances, the alleged fraudulent grantor is a necessary party defendant.

The *Attorney General v. The Guardian Mutual Life Insurance Company* (77 N. Y., 272), which is relied upon, is not in point. That case was under a statute which authorized the Supreme Court to dissolve the corporation, and, it having been done, the corporation was no longer in existence and could not have been made a party. The case at bar was not brought under sections 1785 and 1786 of the Code of Civil Procedure, and the Syracuse Iron Works has not been dissolved, but is an existing corporation, with all of the legal rights of a corporation, and is a necessary party defendant in this action, brought to set aside a judgment and a transfer of its property had by its consent.

The interlocutory judgment must be reversed with costs, and the demurrer sustained, with leave to the plaintiff to plead anew within twenty days after notice of the entry of judgment, upon payment of the costs.

HARDIN, P. J., and BOARDMAN, J., concurred.

Interlocutory judgment reversed, and the demurrer sustained with leave to plaintiff to amend upon payment of costs of the demurrer and of the appeal within twenty days.

## HALLAM ELDRIDGE, APPELLANT, v. THE CITY OF BINGHAMTON, RESPONDENT.

*Eminent domain — right of the State to acquire the fee of lands to be used for a canal — of its right to authorize such lands to be used by a city as a public street — 1 R. S., 225, 226, secs. 46, 52 — 1878, chap. 891.*

In 1838 the State of New York, acting under the authority of chapter 83 of 1833 and the general laws of the State, through its canal authorities, took possession of certain lands in Broome county for the purposes of the Chenango canal, the usual regular steps being taken to obtain the right to the land, under and by virtue of a condemnation and appraisal by the canal appraisers, as provided in sections 46 and 52 of 1 Revised Statutes, 225, 226. The appraisers, in view of the advantages and benefits likely to accrue to the residue of the property by reason of the canal facilities, allowed no money compensation for the land taken.

By chapter 891 of 1878, the right to take possession of said canal lands for the purpose of laying out a street was given to the city of Binghamton by the State, and under and by virtue of the authority conferred by the said act and a resolution of the common council, the said city thereafter entered upon and took and still retains possession of the same. Upon the trial of this action, brought by the plaintiff, who, as heir or assignee, had acquired all the rights of the persons in whom the title to those lands was vested at the time of their appropriation by the State, to recover the possession thereof;

*Held*, that the action could not be maintained.

That the acts, under which the State acquired an estate in fee simple to the lands, were constitutional and valid, and that the city acquired the right to enter upon and use the same as a public street, by the act of 1878.

APPEAL from a judgment in favor of the defendant, entered upon a verdict directed by the court at the Broome Circuit, and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

This State in 1838, under an act of the legislature passed February 23, 1833 (chap. 32), took possession of certain lands for the use and purposes of a waterway or canal, designated in the act as the Chenango canal. The title to a portion of these lands was vested in the grantors of appellant, who, as heir or assignee, has acquired all the rights which his grantors held at the time of the appropriation of the land by the State, subject only to the rights of the people of the State to a use of the same for the Chenango canal. The canal appraisers estimated the lands and other property taken

to be worth \$2,500, but considering that the advantages likely to accrue to the residue of the property by reason of the canal facilities to be afforded to them thereby were of superior value, allowed no other compensation for the land taken. The appellant's grantors, within the time required, filed their claim for damages in pursuance of the statute under which the appraisers acted. The State entered upon the lands, took possession and constructed and operated the canal, retaining possession until 1878, when, by an act of the legislature (chap. 391), the State released these premises to the city of Binghamton, together with the remainder of the Chenango canal lying within the limits of the city of Binghamton, and authorized the city to take possession of and use the same for a public street, to be known as State street, in said city; providing, however, in said act, that "nothing in this act contained shall affect in any way the legal rights of individuals."

The respondent, by virtue of said act and a resolution of its common council, entered upon said lands and now retains possession of the same, not having in any way exercised the right of eminent domain, having appointed no commissioners and having given no notice to property owners, as provided by general statute or the city charter, but simply declaring by resolution that a street existed, and making a map thereof.

*George Whitney*, for the appellant.

*A. D. Wales*, for the respondent.

FOILETT, J.:

SEC. 46. "When any lands, waters or streams, appropriated by the canal commissioners to the use of the public, shall not be given or granted to the State, it shall be the duty of the appraisers to make a just and equitable estimate and appraisal of the damages and benefits resulting to the persons interested in the premises so appropriated, from the construction of the work, for the purpose of making which such premises shall have been taken." (1 R. S., 225.)

SEC. 52. "The fee simple of all premises so appropriated, in relation to which such estimate and appraisal shall have been made and recorded, shall be vested in the people of this State." (1 R. S., 226.)

It is conceded that an estimate and appraisal of the damages for taking the lands sought to be recovered in this action, were made and recorded in the year 1838. Statutes authorizing the benefits inuring to the lands remaining, and adjacent to the lands taken, to be estimated and the value of such benefits set off against the value of the lands taken, have been held constitutional. (*Livingston v. The Mayor of New York*, 8 Wend., 85; *Betts v. The City of Williamsburg*, 15 Barb., 255; *Long Island R. R. Co. v. Bennett*, 10 Hun, 91; *Mills' Em. Domain*, § 151, and cases there cited.)

It has been held that sections 48 and 49 (1 R. S., 226), providing that the State acquires the fee simple of lands appropriated without making any compensation, in case the owner fails to file his claim within one year, are constitutional. (*Birdsall v. Cary*, 60 How. Pr., 358, and cases there cited.) If the sections last cited are constitutional it is difficult to see why sections 46 and 52 are unconstitutional. The lands taken for the Erie canal were appropriated under a like statute (sec. 3, chap. 262, Laws 1817), and so were the lands for all of the canals of this State. This court is bound by the cases cited, and only the court of last resort can overthrow the multitude of titles resting on the statutes cited and similar statutes.

For forty years the State was in possession of the land in question, claiming to own it in fee simple, and thereby it acquired title. (*Birdsall v. Cary*, *supra*.)

The judgment is affirmed, with costs.

HARDIN, P. J., and BOARDMAN, J., concurred.

Judgment affirmed, with costs.

# MEMORANDA

OF

## CASES NOT REPORTED IN FULL.

HENRY O. ELY, APPELLANT, v. WILLIAM E. TAYLOR, AS  
ADMINISTRATOR, ETC., OF HATTIE S. PHELPS, DECEASED,  
RESPONDENT.

48	205
72	457
42	205
83	406

*Refusal of an executor or administrator to consent to refer a claim — when the claimant is entitled to recover costs — effect of the certificate of the judge or referee as to the refusal to refer — Code of Civil Procedure, sec. 1836.*

APPEAL from an order made at the Otsego Special Term and entered in Broome county, denying the plaintiff's motion for costs and an extra allowance.

The court at General Term said: "This is an appeal from an order refusing plaintiff costs and an extra allowance. The plaintiff presented to defendant a bill for services rendered to or for defendant's intestate. The claim was rejected. The referee certifies that the defendant refused to refer the claim under the statute. He also shows the concession of the defendant that he refused to refer the claim in pursuance of plaintiff's notice, whereby plaintiff offered to refer the claim under the statute to certain persons named, 'or any other suitable or proper person, as referee, to be approved by the surrogate.' Besides this evidence, concession and certificate furnished by the referee, there is evidence that B. S. Richards, the attorney for the defendant in this action, refused to refer the claim, and advised plaintiff's attorney that he might as well sue it at once. Afterwards the action was commenced, and again the defendant, through his counsel, resisted a reference which was, however, granted.

"Section 1836 of the Code provides that where 'the defendant refused to refer the claim as prescribed by law, the court may award costs against the executor or administrator, to be collected either out of his individual property, or out of the property of the decedent, as the court directs, having reference to the facts which appeared upon the trial. Where the action is brought in the Supreme

Court \* \* \* the facts must be certified by the judge or referee, before whom the trial took place.' We think the certificate of the referee 'that the defendant, before the commencement of the action, refused to refer the claim under the statute' is *prima facie* conclusive upon the court, and is a fact proper to be certified. Certainly no person can better determine that question, and it is far wiser to allow such determination to control than to resort to affidavits of attorneys and interested parties. Often the merits of the controversy are decided and the costs alone are at stake. Of what use is a certificate if it decides nothing? Why should a judge or referee be required to certify what the fact is and then allow him to be contradicted or impeached by loose affidavits? When a case is charged to have been unreasonably defended, the facts which appear upon the trial may properly be referred to, and in such cases if the certificate does not state all the facts, fully and fairly, they may be shown by affidavits. But where the sole fact controlling the grant of costs against the defendant depends upon his refusal to refer, the certificate of the referee upon a concession by defendant, on trial, ought to be conclusive. Whether the costs should be charged against the defendant, personally, or against the estate he represents, may depend upon other facts appearing on the trial, which may be shown by affidavits, if necessary. The refusal to refer is a fact, and not a conclusion of law. The evidence of such fact need not be certified.

"The plaintiff must apply to the court for an allowance of costs before it can be included in the judgment. Such was the law before the Code, and it is so still. The certificate of the referee, it would seem, must be presented showing the necessary facts. The essential fact in the present case is the refusal by defendant to refer. If he did refuse the plaintiff is entitled to costs. If it be conceded that the certificate is not conclusive, and that other evidence upon that question is competent, we still think the refusal of the defendant to refer is abundantly established."

*Alex. Cumming*, for the appellant.

*Jerry McGuire*, for the respondent.

Opinion by BOARDMAN, J. ; HARDIN, P. J., and FOLLETT, J., concurred.



Order of Special Term reversed and plaintiff's motion for costs and disbursements granted, with ten dollars costs and disbursements of this appeal.

JOHN W. HOLLENBACK, APPELLANT, v. C. J. KNAPP,  
RESPONDENT.

*Offer of judgment on appeal from a judgment in a Justice's Court — right of the party accepting it to costs — Code of Civil Procedure, sec. 3070.*

APPEAL from an order of the Onondaga County Court.

This action was commenced in a Justice's Court, where the defendant succeeded and had judgment against the plaintiff for costs, fifteen dollars and thirty-nine cents. The plaintiff claimed to recover twenty-seven dollars and fifty cents, with interest from September 1, 1885. The plaintiff appealed to the County Court from the justice's judgment, and paid said fifteen dollars and thirty-nine cents costs and two dollars for return. May 12, 1886, and after such appeal had been taken, the defendant served upon the plaintiff an offer to allow judgment in the County Court in said action in favor of plaintiff and against himself, defendant, for twenty-eight dollars and sixty-five cents. This offer was duly accepted by a notice without any date; at the same time notice was given by plaintiff that judgment would be entered on the offer and acceptance and the costs taxed at seventeen dollars and thirty-nine cents, being the amount of costs and fees paid to the justice on taking the appeal. This notice was accompanied by an affidavit showing the facts relating to the Justice's Court and judgment, and the amount of costs and fees so paid to the justice. The defendant thereupon obtained, on an affidavit, an order to show cause before the County Court why the pretended acceptance of offer of judgment \* \* \* should not be set aside, and why the proceedings of plaintiff and appellant should not be stayed until the cause can be regularly reached and tried in its order on the calendar, or, if the court should deem such acceptance of judgment regular, why appellant should not be compelled to enter judgment against the respondent for the sum of twenty-eight dollars and sixty-five cents, and for such other and further relief as may be just and proper, with costs."

On the return of such order to show cause the County Court ordered the appellant, within ten days, to enter judgment against the defendant for twenty-eight dollars and sixty-five cents, and stayed the plaintiff's proceedings to tax his costs before the county clerk, and gave defendant ten dollars costs.

The court at General Term said: "We think the practice of the defendant's attorney was incorrect, so far as he sought to stay the taxing of plaintiff's costs, and ordered the entry of judgment for the twenty-eight dollars and sixty-five cents only. When the plaintiff should have taxed his costs and included them in the judgment, the defendant could move the County Court to strike them out as illegally or improperly inserted under the offer and acceptance. The relief granted was, therefore, unwarranted; and the other relief sought by defendant was, in effect, denied. But upon the merits of the case we think the plaintiff was entitled to recover the seventeen dollars and thirty-nine cents which he had to pay to perfect his appeal. By section 3070 the offer of judgment must be 'for a specified sum.' On acceptance the clerk 'must enter judgment accordingly.' The party refusing to accept 'shall be liable for costs of the appeal, unless the recovery shall be more favorable to him than the sum refused.' The costs and disbursements are a mere incident to the recovery. The debt or damages are the recovery and not the costs, which are uncertain, indefinite and growing as the case goes on. The costs and disbursements have nothing to do with the offer of judgment, and ordinarily follow the recovery as an incident thereto. If the plaintiff had not accepted the offer of judgment made by the defendant, he would necessarily have failed in obtaining a more favorable recovery, because the offer was for the whole amount of his claim, and so he would have been punished with the costs of the appeal. Can it be supposed that he is to be punished by losing the costs and fees paid the justice because he accepts of the total amount of his claim when offered? That would be highly unjust, and we do not believe it is the meaning or intent of the Code. It would be a reproach to the law to permit such injustice if it can be fairly avoided. Prior to the amendment of 1885 the plaintiff's position was clearly correct, and though the language is altered and less distinct we do not believe any substantial change in this respect was contemplated.

"The order of the County Court should be reversed, with ten dollars costs and disbursements of this appeal to plaintiff against the defendant, and the motion of the defendant denied, with ten dollars costs."

*M. N. Tompkins*, for the appellant.

*William M. Ross*, for the respondent.

Opinion by BOARDMAN, J.; HARDIN, P. J., and FOLLETT, J., concurred.

Order of the County Court of Onondaga county reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

LORETTA HART, APPELLANT, v. HEALON HAZARD,  
RESPONDENT.

*Evidence — when a reduction in the rent reserved by a lease under seal can be proved by unsealed indorsements thereon.*

APPEAL from a judgment, entered upon the report of a referee in Oswego county, dismissing the plaintiff's complaint. The action was brought to recover the amount due on a promissory note, and also to recover the rent of a farm.

On January 22, 1877, the plaintiff's assignor and the defendant executed a sealed lease by which, in consideration of \$660, rent to be paid, it was agreed that the defendant should occupy a farm belonging to the assignor of the plaintiff. The lease provided, among other things, that "the terms of this lease shall be for two, three or five years, from the 1st day of April, 1877, as the parties may elect."

The defendant went into possession, and occupied for one year under the lease. No question is made here as to his liability to pay \$660 for that year. The lessor and lessee on January 4, 1878, executed upon the lease the following instrument, viz. :

"PHENIX, January 4, 1878.

"For value received in continuance of this farm lease (and fulfillment of same), I do hereby indorse on the same one hundred dollars,



a modification of an executory parol contract, which was valid and lawful.' 'Both parties acted under this arrangement, and it was executed and carried into effect. The defendant occupied, and the plaintiff received the rent, according to the altered terms of the contract. It is no answer to say that the receipt in full was not conclusive, or that the rent was not promptly paid, for the contract was executed.'

"In the case in hand it appears, by evidence, that Childs, the assignor of Hart, settled and adjusted with defendant under the assumption that the rent was five hundred and sixty dollars per year, after the first year. The referee did not err in admitting the indorsements upon the lease and giving effect to them. He has found, as a question of fact, that the defendant had fully paid the rent and is not indebted. There was evidence warranting the finding. The appellant cites and relies upon *Coe v. Hobby* (72 N. Y., 148). There the agreement was verbal and executory, and Judge ALLEN says: 'If the evidence is examined it will be seen that there was no agreement by parol upon any consideration to reduce the rent proved.' That case differs from the one here, as the parties had not fixed upon absolute terms. The lessor had reserved the right to terminate at the end of each year, and the parties had an option as to whether the lease 'shall be for two, three or five years from the 1st of April, 1877, as the parties may elect.'"

*Avery & Merry*, for the appellant.

*J. R. Shea*, for the respondent.

Opinion by HARDIN, P. J.; BOARDMAN and FOLLETT, JJ., concurred.

Judgment affirmed, with costs.

# Cases

DETERMINED IN THE

## THIRD DEPARTMENT,

AT

GENERAL TERM,

November, 1886.

DAVID IRELAND, EXECUTOR, ETC., OF JENNIE ANGLE,  
DECEASED, RESPONDENT, v. MIRA A. IRELAND, AN INFANT  
BY GUARDIAN, ETC., APPELLANT.

*Change in the disposition of money to be received on the death of a member of a lodge—the transfer must be made in the form prescribed by the by-laws of the lodge.*

Upon the application of Delbert Ireland, a certificate of membership in the Grand Lodge of the Ancient Order of United Workingmen was issued to him, which entitled him to participate in the beneficiary fund of the order to the amount of \$2,000, which sum was, at his death, to "be paid to Jennie Ireland, sister, \* \* \* upon the express condition that Ireland should, in every particular while a member of the order, comply with all the rules and requirements thereof." One of the rules of the order, which was printed upon the back of the certificate, provided that any member desiring to make a new direction as to its payment might do so by authorizing such change in the form prescribed and printed upon the back of the certificate, to be attested by the recorder of the lodge and reported to the grand recorder, paying fifty cents and surrendering the old certificate and taking a new one.

Ireland was unmarried when he procured the certificate, but subsequently married the defendant. On Sunday, the 21st of June, 1885, being under apprehension of death from existing illness, he sent for a friend, Mr. Wing, delivered to him the certificate and told him that he wanted it so changed that his wife should have the benefit of it; that he wanted Wing to have it changed. Wing proposed to go immediately with the certificate to the recorder of the lodge, who resided in the village, and have the change made then, but Ireland objected to having it done on Sunday and told Wing to have it done the next

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THIRD DEPARTMENT, NOVEMBER TERM, 1886.

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day. Ireland's wife was present at the time. Wing took the certificate and on the following morning sought to find the recorder of the lodge, but did not succeed in doing so. Ireland died that morning before any further steps had been taken to change the beneficiary.

*Held*, that the sister was the owner of the certificate and was entitled to receive the amount payable thereunder.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

*J. W. Crane*, for the appellant

*J. W. Houghton*, for the respondent.

LONDON, J. :

Delbert Ireland was a master-workman of the "Grand Lodge, Ancient Order of United Workingmen of the State of New York." He held its certificate of membership, wherein it was certified that he "is entitled to all the rights and privileges of membership, \* \* \* and to participate in the beneficiary fund of the order to the amount of two thousand dollars, which sum shall, at his death, be paid to Jennie Ireland, sister, \* \* \* issued upon the express condition that said Delbert Ireland shall, in every particular, while a member of said order, comply with all the rules and requirements thereof."

Upon his application for membership he had so agreed. One of the rules of the order, which was printed upon the back of the certificate, prescribed that any member desiring to make a new direction as to its payment might do so, by authorizing such change in the form prescribed and printed upon the back of the certificate, to be attested by the recorder of the lodge and reported to the grand recorder, paying fifty cents, surrendering the old certificate and taking a new one. He was unmarried when he procured this certificate, and subsequently married the defendant. On Sunday the 21st of June, 1885, being under apprehension of death from his existing illness, he sent for his friend, Mr. Wing, delivered to him the certificate and told him that he wanted it so changed that his wife should have the benefit of it; that he wanted Wing to have it changed. Wing proposed to go immediately with the certificate to the recorder of the lodge, resident in the village, and have the change made then; but Ireland objected to having it done

on Sunday, and told Wing to have it done the next day. Ireland's wife was present at the time. Wing took the certificate, and on the following morning undertook to find the recorder of the lodge, but did not succeed, and Ireland died that morning before any further steps had been taken to change the beneficiary. Mr. Ireland's sister sued the insurance association. It thereupon paid the money into court and procured the wife of Mr. Ireland to be substituted as defendant.

The insurance association was thus allowed to drop out of the contest, upon the theory that it was ready to pay the rightful claimant. Its payment of the money does not in any way better or prejudice the legal position of either party against the other. The party that succeeds must make a case that would have entitled her to succeed against the association. (*Vosburgh v. Huntington*, 15 Abb., 254; *McKay v. Draper*, 27 N. Y., 260; *Ballou v. Gile*, 50 Wis., 619.)

It is claimed that this was an executed gift of the certificate to the wife, or to Mr. Wing for her. We do not think so. In order that a gift may be perfected by delivery, the subject-matter of the gift must be capable of transfer by delivery. What was needful to be done here, and what Mr. Ireland manifestly understood was needful, was to revoke the existing designation of the sister, and then make the designation of the wife. How this was to be accomplished, the rules of the association instructed Mr. Ireland, and he had agreed to observe them. He sought to observe them. On the face of the certificate the sister remains the designated beneficiary. There was one way in which she could have been divested of her expectant interest. She insists that since that way has not been observed she has not been divested.

It is plain that the association, bound by its contract to pay her, would have no answer to her demand. (*Story v. Williamsburgh M. M. B. Assn.*, 95 N. Y., 474; *Hellenberg v. Dist. No. 1*, 94 id., 580.) In the case last cited the contract for insurance was that the lodge should pay such person as the insured "shall formally designate to his lodge." He failed to designate anybody in the form prescribed by the contract, but did designate his brother in his will. The court held that because the designation by will had not been brought to the notice of the defendant, in the lifetime of



the testator, the designation was not such as the contract called for, and, therefore, the defendant was not liable to pay. We are cited by the counsel for the wife to the case of *Maderia v. Maderia* (5 Eastern Rep., 484) and *Scott v. Provident Mutual Relief Association* (Id. 749.)

In the *Maderia* case the policy was of the ordinary kind, taken by the insured, payable upon death to his heirs or legal representatives. He gave it to his wife, whom he married after obtaining it. The questions in the case were, whether he could pass title in it to his wife by gift, and whether the circumstances proved a gift. The court held with the wife upon both questions. We hold in this State, that such a policy will pass by assignment, and, therefore, why not by gift, in the absence of any opposing contract, charter or statutory restrictions, especially if the donee has an insurable interest. (*St. John v. Am. M. Ins. Co.*, 13 N. Y., 31; *Cannon v. N. W. Mut. Life Ins. Co.*, 29 Hun, 470.)

The *Scott* case was one where a certificate of membership was reformed after the death of the insured, by inserting the name of the beneficiary in the certificate. It had been omitted by inadvertence. Both the insured and the association understood, at the time of the application, that the name should be inserted without further direction. It was the fault of the association that the name had not been inserted, and it certainly could take no advantage of that.

Wing was simply the agent of Ireland, to do for him what it was competent for him to do for himself. Wing was, it may be conceded, the trustee for the time being of the certificate, but only for the purpose of executing his agency respecting it. When Ireland died his agency ceased, and the title to the certificate vested in a new owner. We think the sister was that owner; that she could have maintained her action against the association, and that the wife could not.

The judgment should be affirmed, with costs.

LEARNED, P. J., and BOOKES, J., concurred.

Judgment affirmed, with costs.

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THE CITY OF COHOES, APPELLANT, v. JAMES MORRISON,  
RESPONDENT.

*Right of a city to recover, from one obstructing a street, a judgment it has been compelled to pay to one injured by reason of such obstruction—how far the defendant is bound by the former judgment when he was notified of the action—dedication of a street—an acceptance on the part of the city must be shown—the acceptance must be subject to all existing burdens—duty of the city to keep its streets in repair.*

This action was brought by the city of Cohoes against the defendant to recover the amount of a judgment which the city, at the suit of one Sewell, had been compelled to pay him because of an injury done to Sewell by a wrongful obstruction of a street, which obstruction was, as between the city and Sewell, the act of the city. The defendant was notified of the action brought by Sewell, and was requested, but failed, to defend it. Upon the trial of this action the judgment-roll in the action against the city was given in evidence.

*Held*, that to make that judgment conclusive evidence, as between the city and the defendant, the city was bound to prove that the defendant was the author of the act whereby Sewell was injured.

That as an inspection of the judgment-roll in that action did not show that that fact had been in issue and determined in that action, and as it was not shown by evidence *aliunde* that it was therein determined, it was necessary for the city to show by proof, outside of that judgment-roll, that the defendant was the author of the act injuring Sewell.

In 1868 the defendant erected a tram-way over the bank of the Erie canal so as to leave a clear space of twelve feet between it and the surface of the canal bank beneath it. The canal bank belonged to the State, and the public were accustomed to travel over it, in passing from a city street, to reach a bridge built by the State across the canal. There was no evidence to show that the city had accepted this portion of the bank as a public street at the time the tram-way was erected. In 1873 the city assumed control and authority over the canal bank, graded and paved it, and in so doing raised its surface so as to reduce the twelve feet of clear space beneath the tram-way to ten feet. In 1874 Sewell, in attempting to drive a circus wagon under this tram-way, was crushed between it and the wagon, the evidence tending to show that if there had been twelve feet of clear space he would have escaped all injury.

*Held*, that as it was only needful for Sewell to show that, as between himself and the city, the city was estopped by its action from denying that the street was a public street, the defendant was not precluded by the former judgment from contesting in this case the question whether the place in question was a public street as between himself and the city.

That, assuming that the State had, at the time of the erection of the tram way, dedicated this portion of the bank to the use of the public as a street, yet before it could be held that a public street had been lawfully established an acceptance on the part of the city must be proved.

THIRD DEPARTMENT, NOVEMBER TERM, 1886.

That there was no evidence of an acceptance until the grade was changed, and as an acceptance must be of the dedication as made, the city's acceptance, when made, was subject to the burden of the defendant's tram-way which then passed over it.

That the State could abandon its own claim, but could not without the defendant's consent, or upon compensation or by proceedings in which he might have an opportunity to be heard, extinguish his, and that the city occupied no better position than the State.

The city contended that the judgment in the former action was conclusive that it did not accept the street, subject to the obstruction, because if it had Sewell could not have recovered, as he was one of the public which had accepted the dedication and thus accepted its burden.

*Held*, that the answer to this was that the city was bound to keep its public streets in a reasonably safe condition for travel, and should not invite the public to use them before it had placed them in that condition.

APPEAL from a judgment in favor of the defendant, entered upon an order made at the Albany Circuit dismissing the complaint.

Prior to 1867 the defendant's grantor was the owner of certain premises on the north side of White street, in the city of Cohoes. These premises were bounded on the south by White street, and on the west by the lands of the Erie canal, belonging to the State.

In 1867 the State built a bridge across the Erie canal, at a point some 240 feet north of White street. To reach this bridge from White street it was necessary to pass over land which belonged to the State, lying between the lot of the defendant and the water of the Erie canal. In the year 1868 the firm of Morrison, Colwell & Paige, of which the defendant was a member, was using this lot for a coal yard, and in order to facilitate the unloading of coal from boats on the canal to their yard, they built a tram-way twelve feet above the road, over which the coal was wheeled and dumped into the coal yard.

In the year 1873, the common council of the city of Cohoes passed a resolution to pave White street, from Mohawk street to the bridge, and grade it from Main street to the bridge. When the street was graded and paved it was raised, under the tram-way, two feet, and after the paving the tram-way was ten feet above the street.

With the street and tram-way in this condition, one Leland Sewell attempted to drive a circus wagon along White street to the bridge. He was caught under the tram-way and seriously injured. In August, 1874, he sued the city of Cohoes and recovered, costs

and all, some \$10,000, Morrison having notice of such suit. The city, after taking the case to the Court of Appeals, and being compelled to pay the judgment, in September, 1880, about six years and one month after the accident, brought this action against Morrison to recover the damages and expense of the suit with Sewell, claiming that he is liable for the judgment, counsel fees and other expenses.

*Matthew Hale*, for the appellant.

*Esek Cowen*, for the respondent.

LONDON, J. :

The city sued the defendant to recover the amount of a judgment which the city at the suit of one Sewell was compelled to pay him, because of the injury done to Sewell by a wrongful obstruction of the street, which obstruction was as between the city and Sewell, the act of the city. The city, upon the theory that this defendant was the author of the obstruction, gave the defendant notice of the action and requested him to defend it, but this he failed to do. The judgment-roll in the action between the city and Sewell was given in evidence in this action. To make that judgment conclusive evidence between the city and the defendant, the city must establish the fact that the defendant was the author of the act whereby Sewell was injured. (*City of Rochester v. Montgomery*, 72 N. Y., 65; *Village of Port Jervis v. First National Bank*, 96 N. Y., 556; *The Mayor of Troy v. Troy and L. R. R. Co.*, 49 N. Y., 657; *City of Chicago v. Robbins*, 2 Black., 418, and 4 Wall., 657.) If that fact was in issue and determined in the action of *Sewell v. The City*, then the judgment in that action would establish it here. But it was not in issue in that action. Sewell only sought recovery from the city, and it was not needful for him to establish that the defendant was the primary author of the act which injured him. At least an inspection of the judgment-roll in that action fails to disclose the existence of that issue, and it is not shown by evidence, *aliunde*, that it was therein determined. It was necessary, therefore, for the city to show by proof outside of the judgment-roll that the defendant was the author of the act injuring Sewell.

Now, the proof is that the defendant did erect over the bank of

the Erie canal, in 1868, the tram-way, between which and his great vehicle, Sewell was caught and crushed, in 1874. (See *Sewell v. Cohoes*, 75 N. Y., 45.) This canal bank was the property of the State upon which the public were accustomed to travel. There is no evidence that it was accepted as a public street by the city at the time this tram-way over it was erected. The tram-way was so erected as to leave twelve feet clear space between it and the surface of the canal bank beneath it. In 1873 the city appropriated the canal bank as a public street; whether rightfully or not, as between the city and the State, was immaterial to the issue between the city and Sewell. (75 N. Y., 45.) The city, assuming control and authority over the canal bank, graded and paved it, and in doing so raised its surface two feet, so that the twelve feet clear space beneath the tram-way was reduced to ten feet. The evidence tended to show that if there had been twelve feet of clear space Sewell would have escaped injury.

Upon these facts the city could not resist the conclusion that its acts caused this tram-way to be injurious to Sewell. It failed, therefore, to prove the facts necessary to bind the defendant, by the judgment, in favor of Sewell, unless the law charged the duty upon the defendant, when the city appropriated the canal bank as a public street, to remove the tram-way. The city had not, prior to Sewell's injury, required its removal.

The complaint in the former case alleged, and the answer denied, that the tram-way was over a public street. It is claimed in behalf of the city that that issue having been made and determined in the former action, is not open to inquiry here. But in order to Sewell's recovery, it was only needful for him, upon that issue, to show that as between himself and the city, the city was estopped by its action to deny that the street was a public street. The city raised the objection, upon the evidence in that action, that it had not been shown that the city had lawfully acquired and established the street; but it was held that it was not necessary to the plaintiff's recovery to proceed so far.

The Court of Appeals, in affirming the judgment, remarked that the city "cannot escape liability for the alleged reason that it had no control over it, and the land belonged to the State." (75 N. Y., 52.) It certainly accords with justice that the defendant here should be

allowed to contest an issue material to his defense in this case, namely, whether, in fact, the place in question was a public street, as between himself and the city. This issue, had he assumed the defense of the city in the former action, he could not have brought to a decision. The city was there estopped by acts in which this defendant had not participated.

The issue in the former action is broad enough either to cover the issue raised here or to exclude it. The issue determined is consistent either with a lawful or an unlawful act, as between the city and this defendant. The judgment, therefore, may or may not have determined the issue now raised by this defendant, and we cannot know, except by extrinsic evidence, whether it did or not. The judgment, therefore, leaves the issue open to further contention. To this effect are the authorities: *Russell v. Place* (94 U. S., 606); *Davis v. Brown* (Id., 423); *Cromwell v. County of Sac* (Id., 351); *Campbell v. Rankin* (99 id., 261); *Doty v. Brown* (4 N. Y., 71); *McKnight v. Devlin* (52 id., 399).

The judgment failing to show that the *locus in quo* was a public street, as between the city and the defendant, at the time the tram-way was erected by the defendant, the construction of the evidence most favorable to the city is that after the tram-way was erected it accepted a dedication from the State. The city contests the conclusion that a street did not exist before the tram-way was erected. The evidence shows that the public had, before the erection of the tram-way, traveled over the canal bank at this point, in order to reach a bridge crossing the canal. Probably this travel was by the implied license of the State—a license revocable at pleasure. But if we assume a dedication by the State, we must find an acceptance by the city before we can hold that a public street was lawfully established, and there are no acts upon which to base an acceptance until the city entered and established a new grade. An acceptance must be of the dedication as made; the acceptance does not enlarge the dedication. When the acceptance was made it was of the street with the defendant's tram-way over it. The city accepted the dedication, subject to the burden. (*Fisher v. Prowse*, 110 Eng. Com. Law, 770; *State of New Jersey v. Society, etc.*, 15 Vroom., 502; *City of Oswego v. Oswego Canal Co.*, 6 N. Y., 257.)

The defendant, so far as appears from the evidence, was the

owner of the tram-way. The State could abandon its own claim, but could not without the defendant's consent, or upon compensation, or by proceedings, in which he might have an opportunity to be heard, extinguish his. The city occupied no better position, and it does not appear that before the injury to Sewell it desired to hold the street otherwise than in subjection to defendant's claim. The city contends that the judgment in the former action is conclusive that it did not accept the street subject to the obstruction, because if it had, Sewell could not have recovered, as he was one of the public which had accepted the dedication, and thus accepted its burden. The answer seems to be that the city is bound to keep its public streets in a reasonably safe condition for travel, and should not invite the public to use them before it had placed them in that condition.

The judgment should be affirmed with costs.

LEARNED, P. J., and BOOKES, J., concurred.

Judgment affirmed, with costs.

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NATHAN BECKER, APPELLANT, v. JACOB LEONARD,  
RESPONDENT, IMPEADED WITH PETER W. BAIN AND  
OTHERS.

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*General assignment by partners — when it includes individual as well as partnership property — right of the partners to pay out of their individual property partnership, in preference to individual creditors — when the right to recover property fraudulently transferred by an assignor passes to the assignee.*

In January, 1876, "Peter W. Bain and William H. Bain, copartners, doing business under the firm name of P. W. Bain & Son," executed a general assignment to V. H. Youngman, which, after reciting that the parties of the first part are indebted, etc., proceeded to state that the parties of the first part do grant, assign and transfer to the party of the second part all and singular the real and personal estate of the parties of the first part in trust to sell, and with the net proceeds pay, first all the debts of the parties of the first part, as such copartners, and second all the private and individual debts of the parties of the first part, provided the respective amounts of the individual debts of each of the said parties does not exceed his portion of the surplus, provision being made that no part of the surplus due one partner shall be applied in payment of the debts of the other.

*Held*, that the assignment contemplated the appropriation of all the partnership and individual property of each partner, first, to the payment of the partnership debts, and, second, the surplus, if any due each partner, to the payment of his individual debts.

That it was not made fraudulent against the individual creditors of either partner, because his individual property was appropriated to pay partnership debts, as each individual partner is individually liable for partnership debts, and so long as he has the disposing power over his individual property he can apply it to that purpose.

This action was brought by the plaintiff, who had recovered, in December, 1878, a judgment upon an individual indebtedness of Peter W. Bain, existing prior to the assignment, to recover money placed in the hands of the defendant by Peter W. Bain, at the time the assignment was made, in order that it might be withheld from his creditors. The defendant paid the money to the assignee in August, 1876.

*Held*, that the action could not be maintained, as the fund in the hands of the defendant passed to the assignee by the assignment.

That the assignee was not a necessary party to this action.

APPEAL from a judgment in favor of the defendant Jacob Leonard, entered upon the trial of this action at the Albany Circuit by the court without a jury.

*George W. Miller*, for the appellant.

*Hungerford & Hotelling*, for the respondent.

LONDON, J. :

In January, 1876, Peter W. and William H. Bain, copartners, made a general assignment to V. H. Youngman, for the benefit of their creditors, both copartnership and individual. Youngman accepted the trust, and is still acting as assignee. At the date of the assignment the defendant, Leonard, held \$1,790.45 of the individual money of Peter W. Bain, one of the assignors. This sum Peter W. Bain placed in defendant Leonard's hands for safe keeping, before the assignment was made, and with the view to withhold it from his creditors. In August, 1876, the defendant Leonard paid this money to Youngman, the assignee.

The plaintiff is the judgment-creditor of Peter W. Bain, with execution unsatisfied. His judgments were obtained in December, 1878, upon the individual indebtedness of Peter, existing prior to the general assignment, and he seeks in this action to reach the



money that was placed in the hands of the defendant Leonard by Peter W. Bain. The trial court gave judgment for the defendant Leonard upon the ground that the fund in the hands of defendant Leonard passed by the assignment to Youngman, the assignee.

It is obvious that if Youngman acquired by the assignment the right to the fund, then the plaintiff cannot reach it in this action. (*Crouse v. Frothingham*, 97 N. Y., 105.) The payment of the money by defendant Leonard to the assignee does not seem to be material, for if the assignee had no title to it then defendant Leonard, notwithstanding his payment, must account for it to the plaintiff, if plaintiff's title be established. The plaintiff insists that the assignment by Peter W. and William H. Bain was of their copartnership property, and not of their individual property, and therefore did not embrace this fund.

We have carefully examined the assignment, and conclude that it does convey the individual as well as the partnership property of the assignors. It is expressed to be an "indenture made the 8th day of January, 1876, between Peter W. Bain and William H. Bain, copartners, doing business under the firm name of P. W. Bain & Son, parties of the first part, and Vreeland H. Youngman, party of the second part." It then recites that "the parties of the first part are indebted," etc. The counsel for the plaintiff insists that the assignment is substantially like the one in *Morrison v. Atwell* (9 Bos., 503) which was held not to include individual property. The corresponding recital in the case cited is "the said copartnership is justly indebted," etc. This assignment then proceeds: "The parties of the first part \* \* \* do grant, assign and transfer to the party of the second part, all and singular, the real and personal estate \* \* \* of the parties of the first part \* \* \* in trust to sell, \* \* \* and with the net proceeds \* \* \* pay first all the debts \* \* \* of the parties of the first part, as such copartners, etc.; second, \* \* \* all the private and individual debts of the parties of the first part, \* \* \* provided the respective amounts of the individual debts of each of the said parties does not exceed his portion of the surplus," and provision is then made that no part of the surplus due one partner shall be applied in payment of the debts of the other.

We think this assignment contemplated the appropriation of all

the partnership and individual property of each partner, first, to the payment of the partnership debts, and second, the surplus, if any due each partner, to the payment of his individual debts. The description of the assignors, and the language of the granting clauses of this assignment, are similar to that employed in the following cases, in which it was held that the individual property of the copartners was included. (*Eastwood v. Ward*, 35 Law Times [N. S.], 502; *Williams v. Hadley*, 21 Kans., 350; 30 Am. R., 430; *Judd v. Gibbs*, 8 Gray, 539.)

The assignment is not made fraudulent against the individual creditors of either partner, because his individual property is appropriated to pay partnership debts. Each individual partner is individually liable for partnership debts, and so long as he has the disposing power over his individual property, he can apply it for that purpose. (*Smith v. Howard*, 20 How. Pr., 121; *Van Rossum v. Walker*, 11 Barb., 237.)

It is the appropriation of firm property to pay the individual debts of the partners that is regarded as fraudulent against the firm creditors. The firm does not owe the individual debts. (*Wilson v. Robertson*, 21 N. Y., 587.) Here, if there had been provision that the individual debts should be paid out of the entire proceeds, instead of out of the surplus, and the individual debts had been unequal, then some of the property of one partner would be appropriated to pay the debts of the other, and hence the assignment would be fraudulent against an individual creditor injured thereby. (*O'Neil v. Salmon*, 25 How. Pr., 246.)

Equity will appropriate partnership property to partnership debts, and individual property to individual debts, and will not permit either class of creditors to appropriate the assets of the opposing class until all the claims of the latter are satisfied. (*Meech v. Allen*, 17 N. Y., 300.) But equity, as the case cited holds, will not supersede the existing lien or disposition, which the debtors lawfully made, and, therefore, will not defeat an assignment made by the individual debtor, of his separate property, to pay his partnership debts, which is otherwise unobjectionable. (*Kirby v. Schoonmaker*, 3 Barb. Ch., 46.)

The fact that Youngman, the assignee, is not a party, is not material to the issues between these parties. In *Crouse v. Froth-*

ingham (97 N. Y., 105), the assignee was made a party, but did not answer. He thereby confessed that he had no title to assert against the judgment creditor. But the court held otherwise; that the rights of the creditors, represented by him, could not be varied at his option, and that the title was in him, for the benefit of all the creditors. There are other objections urged against the plaintiff's recovery, but we do not think it necessary to discuss them.

The judgment should be affirmed, with costs.

LEARNED, P. J., and BOOKES, J., concurred.

Judgment affirmed, with costs.

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WALTER S. CHURCH, APPELLANT, v. DE WITT C.  
SCHOONMAKER, RESPONDENT.

*Landlord and tenant—when the possession of the tenant becomes adverse—Code of Civil Procedure, sec. 873—after it has become adverse a deed conveying the landlord's interest is void for champerty.*

In 1851, one Paul Settle conveyed to his son, Edward, a lot of four acres, which had been leased, in 1795, by Stephen Van Rensselaer to Jacob Post for the term of sixteen years at a rent of six pounds per annum. Edward paid the arrears of rent in full up to January, 1860. On March 26, 1860, Edward conveyed the premises, by a quit-claim deed, to one Becker, "subject to the rents and covenants and conditions reserved in the original lease to Jacob Post." Becker, on March 29, 1861, conveyed a parcel of said premises by a warranty deed, not mentioning the rent or lease, to the defendant Schoonmaker, who has since been in possession thereof; no rent having been paid by him, and no demand therefor having been made upon him, before February 24, 1883, when this action was commenced to recover the possession of the premises. On July 5, 1883, Becker paid to the plaintiff, who had acquired by deed, on February 1, 1883, the interest of the Van Rensselaers, the rent in arrear upon the whole four acres, but without the knowledge or consent of the defendant Schoonmaker.

Held, that Becker, at the time he gave the warranty deed to Schoonmaker, was a tenant, from year to year, of the Van Rensselaers.

That as he could convey no better title than he held, he conveyed to Schoonmaker a tenancy from year to year, thereby making the possession of Schoonmaker that of the Van Rensselaers until the expiration of his tenancy. That, by section 873 of the Code of Civil Procedure, the tenancy between the Van Rensselaers and the defendant continued for twenty years from the time

of the last payment of rent, which, in this case, as regarded the defendant Schoonmaker, was made in January, 1860.

That at that date Schoonmaker's holding commenced to be adverse as against the Van Rensselaers, and that the deed from them to the plaintiff was void for champerty.

*Semble*, that Schoonmaker's title, though adverse to the Van Rensselaers, would not have been good as against an action of ejectment brought by them. (LEARNED, P. J., not concurring.)

APPEAL from a judgment entered in Albany county in favor of the defendants upon the report of a referee. The action was ejectment for the non-payment of rent.

*S. W. Rosendale*, for the appellant.

*W. & G. W. Youmans*, for the respondent.

LONDON, J. :

In 1795, Stephen Van Renselaer leased to Jacob Post a lot of four acres for the term of sixteen years at six pounds rent per annum. Post took possession under the lease. Paul Settle afterwards came into possession, and in 1851 conveyed the premises to his son Edward, who paid up the arrears of rent in full to January, 1860. On the 26th of March, 1860, Edward Settle, by quit-claim deed, conveyed the premises to John J. Becker, the deed reciting: "Subject to the rents and covenants and conditions reserved in the original lease to Jacob Post." Becker conveyed, March 29, 1861, a parcel of said premises to the defendant Schoonmaker, by warranty deed, without any mention of rent or of the Post lease, and Schoonmaker has since been in possession, the defendant Gallup also occupying with him at the time this action was commenced. No rent has ever been paid by Schoonmaker, and none demanded of him before February 24, 1883, the date of the commencement of this action. On the 5th of July, 1883, Becker, defendant's grantor, paid to the plaintiff the rent in arrear upon the whole four acres, but without the knowledge or consent of the defendant. The plaintiff, by deed, acquired the interest of the Van Rensselaers in the premises February 1, 1882. When the plaintiff obtained the deed from the Van Rensselaers, Schoonmaker had held the premises upwards of twenty years under his warranty deed from Becker. Becker at the time he gave the warranty deed to Schoonmaker was the tenant of

the Van Rensselaers. The term of sixteen years, expressed in the Post lease, had expired long before, and Becker's tenancy was from year to year. Becker could convey no better title than he held; he, therefore, conveyed to Schoonmaker a tenancy from year to year. (*Whiting v. Edmunds*, 94 N. Y., 309.) The possession of Schoonmaker was the possession of the Van Rensselaers until Schoonmaker's tenancy expired. (Code Civil Pro., § 373.)

The relation of landlord and tenant existed. But there had been no written lease between these parties or their grantors, since it could not be said that the Post lease, the term of which had long since expired, was the existing lease; the law made a lease after the expiration of the Post lease and referred to that lease for the conditions and yearly rents, if no other had been fixed; but other rate of rent had been fixed between Becker and the Van Rensselaers.

By section 373, Code of Civil Procedure, the tenancy between the Van Rensselaers and the occupant continued "until the expiration of twenty years after the last payment of rent, notwithstanding that the tenant has acquired another title, or claimed to hold adversely." The last rent was paid, so far as Schoonmaker is affected, to January, 1860. The landlord, therefore, was constructively in possession until January, 1880. At that date Schoonmaker's holding commenced to be adverse. The adverse possession, therefore, had not continued long enough to bar this action (Code Civil Pro., § 368), if the Van Rensselaers had brought it. But the reasons given make the deed to the plaintiff of February 1, 1882, void for champerty. The statute provides that a deed shall be void if when delivered the lands are in the actual possession of a person claiming "under a title adverse to that of the grantor." Schoonmaker had title to the land from Becker, but, as we have seen, that title, up to January, 1880, was constructively the title of a tenant, and he could not start an adverse possession under it until January 1, 1880. He then had a title, not good against the Van Rensselaers' action of ejectment, but adverse to the Van Rensselaers; adverse, *first*, because it did not in fact recognize the Van Rensselaers' title, but was of the entire fee, and hence inconsistent with it (*Sands v. Hughes*, 53 N. Y., 293), and, *second*, because, by twenty years' non-payment of rent, the law did not longer attach any relation of landlord and tenant to it. It is true that Schoon

maker's title was not superior to the Van Rensselaers' title, but it had become hostile or adverse to it, and was a title, not a mere claim of title. (*Dawley v. Brown*, 79 N. Y., 390; *Fish v. Fish*, 39 Barb., 513.) The Van Rensselaers could only show paramount title by evidence extrinsic to the two titles, and the policy of the champerty act is, as said in *Sands v. Hughes*, to prevent the party out of possession from transferring his right to litigate that question.

The defendant was not a party to the payment of rent by Becker, in 1883, and had no knowledge of it. The appellant insists that this finding is not supported by the evidence. But Schoonmaker had reason to suppose that there was no rent reserved, and Becker had reason to pay without the knowledge of Schoonmaker. Becker certainly could not, after he had assumed to convey full title, without the knowledge of his grantee, do any act to the prejudice of the title he had given. Either the landlord or tenant must suffer from the act of Becker, and it would seem that the negligence of the landlord was greater than that of the tenant, since the landlord knew and the defendant did not, that rent was due, and the landlord was put upon inquiry by the long occupation of Schoonmaker, as to his claim to occupy.

The plaintiff suggests that he should be permitted to amend by substituting his grantors as plaintiffs. (Code Civil Pro., § 1501.) If the statute of limitations had barred his action in the name of his grantors this suggestion would have more force.

Judgment affirmed, with costs.

BOOKES, J., concurred.

LEARNED, P. J. :

I concur in the result, but am not willing to say that an action could be successfully maintained against the defendants by the Van Rensselaers.

Judgment affirmed, with costs.

CHARLES DUNTLEY, APPELLANT, v. MORTON H. DAVIS,  
RESPONDENT.

*Tax collector — effect of his failure to give a bond as required by section 24 of chapter 567 of 1875 — when his acts done under the warrant are rendered valid by the subsequent giving of the bond.*

A warrant for the collection of school taxes was, on December 11, 1882, placed in the hands of the defendant, who had, in the previous October, been duly elected collector of taxes. At the time he received the warrant he had not been notified to give a bond, nor had the amount thereof been fixed by the school meeting or the trustee, as required by section 24 of chapter 567 of 1875. The defendant posted the statutory notice to the taxpayers to make voluntary payment within two weeks, and personally demanded payment of them within the life of the warrant; the plaintiff refused to pay the tax assessed against him, which amounted to one dollar and twelve cents. Upon the expiration of the warrant it was, on January 24, 1883, duly renewed by the trustee. On the next day the defendant gave his bond to the trustee and then again demanded payment of the plaintiff, and upon his refusing to pay levied upon a wagon belonging to him and thereafter sold it, without having again posted the statutory notices giving the taxpayers time for voluntary payment.

*Held*, that so much of the statute as required a bond to be given by the collector was mandatory, but that the provision prescribing the time within which this should be done was directory only.

That in the absence of any evidence that the taxpayer or the public were prejudiced by the failure of the defendant to give the bond at the time prescribed by law, and inasmuch as abuses did not seem likely to arise or to be favored by so holding, public policy required the court to hold that upon the filing of his bond by the collector all his acts done under the warrant before the levy and sale were validated.

APPEAL from a judgment in favor of the defendant, entered upon a verdict rendered in the County Court of Essex county, and from an order denying a motion for a new trial made upon the minutes.

The action was originally brought in a Justice's Court to recover the value of a wagon alleged to have been wrongfully seized and sold by the defendant, as a collector, for the non-payment of a school tax.

*B. Pond*, for the appellant.

*Milo C. Perry* and *Marcus D. Grover*, for the respondent.

LONDON, J. :

The warrant for the collection of the school taxes was placed in the hands of the defendant December 11, 1882. He had been

duly elected collector of taxes for the school district in October previous. He was, therefore, collector *de jure*. (*Foot v. Stiles*, 57 N. Y., 399; *Williamson v. McKinney*, 52 id., 382.) He had not, at the time he received the warrant, been notified to give a bond, nor had the amount thereof been fixed by the school meeting or the trustee, as the statute requires. (Laws 1875, chap. 567, § 24.) The defendant, as collector, was not, therefore, so in default, because of such omission to give the bond, as to avoid his title to the office, or to make it defeasible. (*Woodhull v. Bohenblost*, 4 Hun, 399.)

The section of the statute cited, however, provides that "within such time, not less than ten days, as the trustee shall allow him for the purpose, the collector, before receiving the first warrant for the collection of money, shall execute a bond to the trustee with one or more sureties, to be approved by a majority of the trustees, in such amount as the district meeting shall have fixed, or, if such meeting shall not have fixed the amount therein, such amount as the trustees shall deem reasonable, conditioned for the due and faithful execution of the duties of his office." (Laws 1875, chap. 567, § 24, p. 644; Laws 1864, chap. 555, § 83, p. 1263.)

The defendant, as collector, notwithstanding he had given no bond, proceeded under the warrant. He posted the statutory notices to the taxpayers to make voluntary payment within two weeks, and he personally made demand of payment of them within the life of the warrant. The tax against the plaintiff was one dollar and twelve cents, which he refused to pay. The warrant expired and was duly renewed by the trustee January 24, 1883. On the next day the defendant gave his bond to the trustee, and then again demanded payment of the plaintiff; this was refused, whereupon the defendant levied upon his wagon and thereafter sold it. The defendant, after giving his bond, did not again post the statutory notice giving the taxpayers time for voluntary payment. It is a condition precedent to the right of the collector to levy and sell that such notices be posted. (*Bedell v. Barnes*, 15 Hun, 353.) If the notices posted before the bond was given were a compliance with the statute, or, if the statute requiring the bond to be given is merely directory, and when given related back to the receipt of the warrant, then the plaintiff cannot complain.



It was held in *Woodhull v. Bohenblost* (4 Hun, 399) that it was the intention of the legislature that the collector should have no power to execute the warrant until the bond should have been given. That was a case between the trustee and collector. No doubt the people for whose benefit the bond is required may rightfully object to his collecting any taxes until he has given the bond guaranteeing his fidelity. It will be seen that the section of the statute quoted above authorizes the trustees to fix the time in which the collector shall give the bond, and makes the time end before the collector receives his first warrant.

Here the time fixed by the trustee ended later. But time, so far as the validity of the bond is concerned, is merely directory, since the statute does not negative its validity, if filed after the warrant is delivered. (*Gale v. Mead*, 2 Den., 160; *Dawson v. People*, 25 N. Y., 399.) The giving of the bond is mandatory; the time when, directory. When, therefore, the defendant had delivered the bond, his competency to execute the warrant was complete. He had posted the preliminary notices when his competency was only partial. The case is not without difficulty, and, so far as we know, is without precedent, but we think that public policy, in the absence of any evidence that the taxpayer or the public were prejudiced thereby, and inasmuch as abuses do not seem likely to arise or be favored, requires the holding that, upon the filing of his bond, all his acts under the warrant, before levy and sale, were validated.

In the case of *Rounds v. Mansfield* (38 Me., 586), to which we are cited, the statute required the pound-keeper, before acting as such, to give a bond. The bond was the condition precedent to his right to act. Here the statute does not say the giving the bond is a condition precedent to the right of the collector to act or to receive the warrant. But we quite agree that he cannot enforce the warrant until he shall have given his bond. Here he had given it before he enforced the warrant.

The judgment should be affirmed, with costs.

LEARNED, P. J., and BOCKES, J., concurred.

Judgment and order affirmed, with costs.

FRANCES A. PARR, AS ADMINISTRATRIX, ETC., OF RICHARD PARR, DECEASED, RESPONDENT, v. THE VILLAGE OF GREENBUSH, APPELLANT.

*Judgment*—to what extent a judgment recovered in a former action is conclusive—contract signed by the board of trustees of a village—power of the board to liquidate the damages—what provision will be construed as liquidating the damages and not as fixing a penalty.

In an action, brought by the plaintiff's intestate to recover for labor performed and materials furnished, in part pursuant to a contract entered into between the intestate and the board of trustees of the village of Greenbush, dated December 20, 1870, and in part under a resolution of the said board of trustees, dated September 30, 1878, the plaintiff was allowed to recover for so much of the materials and labor as he had furnished and performed under the contract, but was not allowed to recover for what he had furnished and done under the resolution, the court holding that it was invalid for want of power in the board of trustees to pass it. Thereafter this action was brought to recover a sum claimed by him to be the liquidated damages fixed by the contract by a provision thereof which provided that "for the true and faithful performance of all and every of the covenants and agreements above mentioned, the parties to these presents bind themselves, each unto the other, in the penal sum of five thousand dollars, as fixed and settled damages, to be paid by the failing party."

*Held*, that the judgment recovered in the first action was no bar to a recovery in this one, as the causes of action were not the same, and as no fact essential to the maintenance of this action was determined adversely to the plaintiff in the former one.

That the satisfaction of the judgment in the former action upon a settlement and compromise between the parties, while an appeal was pending, did not embrace this cause of action.

That as the village had power to make the contract, it had power to fix and determine the amount of the damages to be sustained upon its breach, subject to the power of the court to correct them if alleged and shown to be so grossly excessive and fraudulent as to justify an inference of collusion being drawn therefrom. That, under the facts and circumstances of this case, the sum named in the contract was to be regarded as liquidated damages.

By the terms of the contract the village agreed to furnish the sand and gravel and grade the street, which it could do in a certain manner prescribed by law, but not otherwise. Having failed to take the steps necessary to enable it to do this, it passed the aforesaid illegal resolution of September thirtieth requiring Parr to furnish the sand and gravel and do the grading. Upon the trial of this action the village claimed that the contract was in part performed by it, and that the intestate accepted such part performance and thereby waived his claim for damages:

*Held*, that this claim was untenable as the damages arose under that part of the contract which the village did not perform.

THIRD DEPARTMENT, NOVEMBER TERM, 1886.

APPEAL from a judgment in favor of the plaintiff, entered at the Albany Circuit upon the verdict of a jury.

The action was brought to recover the sum of \$5,000, which was claimed to have been fixed as the liquidated damages to be paid by either party failing to perform a contract entered into between the plaintiff's intestate, Richard Parr, and the defendant village, whereby Parr agreed to flag, pave and curb the west side of a street, in the village of Greenbush, and the defendant agreed to furnish all the sand and gravel and to properly grade the street.

*J. B. O' Malley*, for the appellant.

*George Parr* and *E. Countryman*, for the respondent.

LONDON, J. :

The contract in question of date December 20, 1870, was adjudged valid in the former suit. The resolution of the board of village trustees of date September 30, 1873, was in the same suit held invalid. (*Parr v. Greenbush*, 72 N. Y., 463.) By the valid contract Parr agreed to furnish certain specified materials and do certain work at a price which the village thereby agreed to pay him. By the same contract the village agreed to furnish the sand and gravel and grade the street. From the nature of the case, Parr could not perform his part of the contract until the sand and gravel were furnished and the grading done. This precedent performance the village had no power to make, or cause to be made, except in a certain prescribed manner, and it never took the steps necessary to acquire the power to make it, and never in fact made it. Being in default, it went outside of its powers and by the void resolution of September 30, 1873, apparently, but not actually, requested Parr to furnish the sand and gravel and do the grading. This Parr did, and his performance was reasonably worth upwards of \$6,000. Having made this performance he went on and performed his contract. He first brought an action against the village to recover for all his labor and materials, and upon the trial made proof of all thereof, furnished under both contract and resolution. He recovered for so much as he had furnished under the contract, but was denied recovery for so much as was furnished under the resolution. It stands adjudged that he can recover nothing under the resolution.

This action was then brought to recover the liquidated damages or penalty agreed upon in the contract of December, 1870. It provides: "And for the true and faithful performance of all and every of the covenants and agreements above mentioned, the parties to these presents bind themselves each unto the other, in the penal sum of \$5,000, as fixed and settled damages, to be paid by the failing party."

The statute of limitations bars the action if the contract is not under seal. The contract recites that it is made under the seals of the parties. It uses the word *covenants*, which implies a seal. It is signed by Parr, and by the president and members of the board of trustees, and a wafer or seal is affixed after each individual name. It was signed at a meeting of the board.

The village has no corporate seal, and, therefore, if it needs to use a seal upon any contract, must adopt, for the purposes of that contract, the seal it chooses to affix thereto. It could use these wafers, and we think that the facts here existing justify, within the authorities, the finding of the trial court, that the contract was under seal. (*Bank of Middlebury v. Rutland, etc., R. R. Co.*, 30 Vt., 160; *Tenney v. East Warren Co.*, 43 N. H., 343; *Pickens v. Rymer*, 90 N. C., 282; *Mill Dam Foundry v. Hovey*, 21 Pick., 417; *South Baptist Soc. v. Clapp*, 18 Barb., 36; 1 Dillon Mun. Corp. [3d ed.], § 190.) The breach of the contract on the part of the village was established. What Parr did at the void request of the village was not done by the village. It could not adopt the act, since it could not ratify what it could not originally authorize.

The judgment in the former action is no bar to the recovery in this. That action sought recovery for work and materials furnished under an invalid resolution; this action seeks recovery for stipulated damages upon breach of a valid contract. The unsuccessful pursuit of a recovery upon an invalid demand is no bar to the successful pursuit upon a valid one. The invalidity of the resolution made all the evidence, given in support of the demand under it, utterly impotent and unavailing. Hence it was impossible to recover anything upon that claim in any action whatever; and since this one was not therein alleged, no recovery upon it was admissible. (*Stowell v. Chamberlain*, 60 N. Y., 276; *Dawley v. Brown*, 79 id., 391.)

To sustain the plea of a former judgment in bar of a second action, it must either appear that the cause of action in both suits is the same, or that some fact essential to the maintenance of the second action was in issue or determined in the first action adversely to the plaintiff. (*Perry v. Dickerson*, 85 N. Y., 345.)

Here the causes of action are not the same, and no fact essential to the maintenance of this action was determined adversely to the plaintiff in the former action. The issue of law that was determined in the former action was that the resolution was invalid. The plaintiff insisted that it was valid, and was overruled. What he insisted upon there, namely, that the resolution was valid, he does not insist upon here; it is so far from being essential to his recovery here that if established it would be fatal to it. The conclusion of law established there aids his recovery here, and, so far as the purposes of this action are concerned, was determined favorably to the plaintiff, and he accepts that determination. If that conclusion is one of fact the same result would follow. The judgment establishes the fact that the resolution was invalid. If that fact could bar this action, the judgment would establish the bar. But the fact which was fatal to the former claim establishes this one. It follows, also, that the satisfaction of the judgment in the former action upon a settlement and compromise between the parties while an appeal was pending, did not embrace this cause of action. It did not in terms, and there is no evidence that would support a finding that such was the intention of the parties.

The village objects that it had no power to make the agreement to pay \$5,000 as liquidated damages. It had the power to make this contract for this work with Parr, to the extent that it should furnish the sand, etc., and pay Parr upon his performance. It would, therefore, have become liable to Parr for his actual damages if it had refused to allow him to perform, he being ready and willing. What would have been the amount of those damages? They could not certainly be known in advance, but they might be estimated and limited. If grossly excessive, fraudulent collusion might be inferred, and be redressed upon proper allegations and proof. But, as was said in *Little v. Banks* (85 N. Y., 263), "while there is no positive statute which authorizes the State officers to fix a sum as liquidated damages for a breach of the contract, inasmuch as they

have the power to make such a contract as would be advantageous to the State, it necessarily follows that they have a right to impose such reasonable provisions as would carry out this purpose."

Here the actual damages which Mr. Parr sustained were in excess of the sum fixed; these are damages which, under the circumstances, it is just the village should pay, because it has had their full equivalent in the work done and materials furnished; to the extent that he suffered, the village was benefited. There does not, for the reasons above stated, appear to be any urgent need to determine whether the \$5,000, should be regarded as liquidated damages or as a penalty. The case of *Little v. Banks* instructs us that the determination must be made in view of the circumstances of each particular case. The courts hesitate to formulate a rule that will prevent the accomplishment of the justice which the particular case requires. Here the contract speaks of "the penal sum of \$5,000 as fixed and settled damages," and we see no reason to dissent from the conclusion of the trial judge that that sum is to be regarded as liquidated damages.

The village further urges that the contract was in part performed by it and that Mr. Parr accepted such part performance, and thus waived his damages. But the damages sustained by Mr. Parr were under that part of the contract which the village did not perform, and the covenant to pay damages was for failure to perform every agreement upon its part. The covenant embraces every breach, and if there was only one, it embraces that. But the defendant refused wholly to perform, and Mr. Parr did all the work and furnished all the material for both parties. He performed the part which the village ought to have performed, doubtless supposing that thereby the village was in fact performing. He could not without injustice be held to have waived a performance which he supposed to have been performed through himself. Waiver implies a consent that the breach existing shall be disregarded. No such consent can be here implied. He in effect said to the village, "I will waive the breach caused by your non-performance, if you will pay me for making performance for you." The condition of the waiver was not accepted.

The judgment should be affirmed, with costs.

LEARNED, P. J., BOOKES, J., concurred.

Judgment affirmed, with costs.

JOHN M. MAYER, RESPONDENT, v. THE EQUITABLE  
RESERVE FUND LIFE ASSOCIATION, APPELLANT.42 237  
78 198

*Mutual benefit life assurance companies—1883, chap. 175—duty of such companies to resist the payment of illegal claims.*

This action was brought to recover an amount alleged to be due, under a mutual benefit life assurance certificate, to the plaintiff, as the assignee of one Stephan, to whom a certificate of membership in the defendant's association had been issued. The defendant is an association, organized under chapter 175 of 1883, for the purpose of mutual benefit life assurance. Upon the trial the defendant offered to show the invalidity of the plaintiff's claim by proving the falsity of certain representations made by Stephan upon procuring the certificate, which representations were made a part of the contract. This evidence was excluded, under the objection of the defendant, upon the ground that as the defendant had acquired the money sought to be recovered by virtue of assessments levied upon and paid by its members for the purpose of paying the claim, it thereby became the agent of its members for the purpose of paying the money upon the claim and had no right to contest its validity or withhold the payment of the money.

*Held*, that the court erred in so excluding the evidence; that it was the duty of the defendant to protect its members and the fund in its hands from all invalid claims.

APPEAL from a judgment in favor of the plaintiff, entered at the Ulster Circuit upon a verdict directed by the court.

The action was brought upon a certificate of membership in the defendant's association (an association organized under chapter 175 of 1883 for the purpose of mutual benefit life assurance), issued to Charles Stephan, which was alleged to have been assigned to the plaintiff, to recover a sum of money claimed to be payable under the beneficiary clause of such certificate.

*Lucius McAdam* and *Samuel Fleischman*, for the appellant.

*E. S. Wood*, for the respondent.

LONDON, J.:

The defendant offered evidence tending to show the invalidity of the plaintiff's claim. This evidence was excluded upon the assumption that the defendant acquired the money in question by virtue of assessments levied upon and paid by its members for the purpose

of paying the claim, and thereby the defendant became the agent of the members for the purpose of paying the money upon the claim, and, therefore, had no right to contest its validity or withhold its payment.

We do not think the facts justify such an assumption. The money was assessed by the defendant upon its members and paid by them under their contracts for insurance with the defendant. These contracts provided that "upon the occurrence of the death of any of its members" the assessment might be levied. The assessment, in this instance, was levied by the defendant upon the occurrence of the death of Charles Stephan, who held, at the time of his death, the defendant's contract of insurance upon his life. That contract was either valid or invalid. By its terms, and by the terms of the constitution and by-laws of the defendant, which were a part of the contract, its validity depended upon the truth of the material representations made by Stephan upon procuring it. The right to payment under the contract depended upon its validity, or, at least, upon the inability of the defendant to show its invalidity. That invalidity it offered evidence tending to show. The defendant was, in a certain sense, the agent of the members of the company, but was an agent with special and defined powers and limitations, and the true and obvious construction of these powers and limitations forbade payment upon a claim which it was able to show was procured through misrepresentation or fraudulent suppression of facts, concerning which it required answers from Stephan when he applied for membership. That it had realized the money with which to make payment was no waiver of its duty to see to it that payment was due. That duty it still owed to its members, who had paid their assessments trusting to the fidelity of the company to protect them and the fund from invalid claims.

We think the defendant was entitled to prove the facts which it offered in defense.

Judgment reversed and new trial granted, costs to abide the event.

LEARNED, P. J., and BOOKES, J., concurred.

Judgment reversed and new trial granted, costs to abide event.



THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
NEW YORK, ONTARIO AND WESTERN RAILWAY  
COMPANY AND OTHERS v. ALFRED C. CHAPIN, COMP-  
TROLLER OF THE STATE OF NEW YORK, AND JAMES L.  
WILLIAMS AND OTHERS, ASSESSORS, RESPONDENTS.

*Assessment of the expenses of the railroad commissioners on railroad companies — the State officers in so doing act judicially — their action may be reviewed on certiorari — construction of the provision of section 13 of chapter 353 of 1882.*

*Certiorari* to review the proceedings of the defendants, as State officers, in making an apportionment of the expenses of the board of railroad commissioners for the year immediately preceding July 1, 1886, pursuant to section 13 of chapter 353 of 1882, which provides that these expenses shall be borne by the several corporations owning or operating railroads "according to their means," and directs the said officers to "assess upon each of said corporations its just proportion of said expenses, one-half in proportion to its net income for the year next preceding that in which the assessment is made, and *one-half in proportion to the length of the main track or tracks on (its) road*; and such assessment shall be collected in the manner provided by law for the collection of taxes upon corporations."

*Held*, that the State officers in apportioning and assessing the expenses acted in a quasi judicial character, and that their action was reviewable on *certiorari* by a company aggrieved thereby. (BOKES, J., dissenting.)

It was admitted that the assessment was made in proportion to one main track on a road-bed, and not in proportion to the several main tracks there might be thereon.

*Held*, that it was error so to do; that the legislature intended that all the main tracks, and not merely a single one, should be included in the estimate.

That the fact that the return disclosed that the assessment had been completed, and that the amounts assessed upon some of the railroads had been paid by them, did not require the court to dismiss the writ as it was not shown that the respondents delivered to any one, or parted with, the assessment which they had made, nor did it appear that the statute required they should deliver the same to any one.

CERTIORARI to review an apportionment, made by the respondents, of the expenses of the board of railroad commissioners, among the railroad corporations of the State, for the year ending June 30, 1886.

Chapter 353, Laws of 1882, entitled "An act to create a board of railroad commissioners, and to define and regulate its powers and duties," provides (sec. 13) that "the annual total expense of the said board of railroad commissioners \* \* \* shall be borne by

the several corporations owning or operating railroads, according to their means, to be apportioned by the comptroller and State assessors, who, on or before the first day of July in each year, shall assess upon each of said corporations its just proportion of said expenses, one-half in proportion to its net income for the year next preceding that in which the assessment is made, and one-half in proportion to the length of main track or tracks on (its) road, and such assessment shall be collected in the manner provided by law for the collection of taxes upon corporations."

On June 30, 1886, the respondents made an apportionment of the expenses of the board for the preceding year, and assessed one-half thereof upon the corporations, in proportion to their net income, as provided by the act, but assessed the other half in proportion to the length of the first or single main track (7,861 miles) only on the road of each, instead of all main track or tracks (10,624 miles), as the act requires. The roads of the relators are mainly single track, and the failure of respondents to include all the main tracks, on roads which have more than one track, increases the assessment against relators.

Prior to the making of the assessment, two of the relators served a written demand upon respondents, in which they claimed that the respondents should make the apportionment in the manner now contended for.

*John B. Kerr*, for the relators.

*D. O'Brien*, attorney general, for the respondents.

LEARNED, P. J. :

By section 13, chapter 353, Laws of 1882, the comptroller and State assessors are to assess on each of the railroads in this State the expenses of the railroad commissioners (which, by a previous section, are to be audited by the comptroller). The assessment is to be one-half in proportion to the net income of the corporation, and one-half in proportion to the length of the main track or tracks of the road.

It seems to us that the respondents act in a *quasi* judicial character. They are to ascertain and determine how much is the net income; how long are the main tracks. And this determination

further involves (as appears by this action) the disputed question, what is the meaning of "main track or tracks." Their decision takes from one railroad and imposes on another a charge, according as they estimate the net income and the main tracks of one or another at a greater or less amount.

Exercise of judgment and discretion in a public agent, it is true, does not make him a judicial officer (*People ex rel. Corwin v. Walter*, 68 N. Y., 411), because ministerial officers are not required to act like idiots. But where a burden is to be borne by each of several parties in a proportion dependent on facts and law, and a board is to make the apportionment according to facts and law; such board has to decide law and fact between conflicting parties. That is judicial.

Is it too late for the relators to obtain relief? The respondents are not required to issue any warrant, they are merely directed to assess, then the assessment is to be collected as provided for collection of taxes upon corporations. That would seem to refer to the taxation under chapter 542, Laws 1880; and the mode provided for the collection of those taxes appears to be an action by the people. (Sec. 9 of that Act.) Therefore the position of these respondents does not seem to be like that of supervisors, who issue a warrant on their tax-roll and deliver that to the collecting officer. Hence the case of *People ex rel. Weeks v. Supervisors* (82 N. Y., 275), is not quite applicable. There is no tax-roll or warrant in this case which is beyond the reach of the respondents. If some of the railroads have paid their assessed amounts, the payment may have been voluntary and restitution may be awarded (Code, § 2142), as may be done on appeal from a judgment. (Sec. 1323.) For the determination need not be reversed. It may be modified (sec. 2141); and these two new provisions seem to relieve cases like this from some difficulties.

The return of the respondents only shows that several railroad companies have paid their proportions as assessed. Any party interested in upholding the decision may come in. (Sec. 2137.) And, in fact, the railroads that have paid appeared on the argument, so that the parties who claim that a reversal or modification would affect them have been heard.

It is not shown in the return that the respondents have delivered to any one, or parted with, the assessment which they made. Nor

does it appear by the statute that they should deliver the same to any one, so that they do not stand in the position of the assessors of taxes (*People ex rel. Marsh v. Delaney*, 49 N. Y., 655), or of the commissioner of taxes (*People ex rel. Law v. Commissioners*, 10 Sup. Ct. [9 Hun], 609), or of the supervisors, as in *People v. Supervisors (ut supra)*. They are, so far as appears, in fact and legally, the custodians of the assessment which is sought to be reviewed. (Code, § 2129.) And they have made return to the writ, setting forth their assessment by reference to the schedule attached to the petition; and thus they have not claimed that the assessment is not still in their custody.

On the merits it seems to us that the relators are right. As the fact did not appear distinctly on the return, it was admitted upon the argument (to prevent any doubt upon this point) that the assessment was made in proportion to the one main track on a road-bed and not in proportion to the several main tracks on a road-bed.

The intention of the legislature seems to have been, in the first place, to apportion one-half according to net income, which would be equitable so far as the roads were profitable. But, inasmuch as some roads might not be profitable, and yet ought to bear their share, the other half was to be apportioned on a different basis; on a basis of what might be considered, approximately, the magnitude of the road, and a basis which would also measure, approximately, the labor of the railroad commissioners in respect thereto. That basis is "the length of main track, or tracks, of road."

Now the respondents, in assessing, take into account only one main track. As, for instance, the New York Central and Hudson River Railroad Company has in fact 2,130  $\frac{4}{100}$  miles of main tracks. But inasmuch as in some places four, and in other places two, of these main tracks are parallel, that company is assessed on only 993  $\frac{2}{100}$  miles. These facts appear in the schedules, and were practically admitted on the argument.

Now the argument of the respondents is that the legislature intended that the test should be the value of the property, based upon the earnings and income. But plainly the legislature did not mean this. They meant that one-half should be assessed in proportion to net income, but that the other half should be assessed in another proportion. The very use of the words "or tracks" in the

statute shows that all the main tracks, and not merely a single one, were to be estimated. If the statute had meant what the respondents claim, it would have said "in proportion to the length of one main track on road." This construction is sustained by the specifications required in annual reports. (Chap. 575, Laws 1880.) There several tracks on main line are spoken of, and are distinguished from sidings and turnouts. Notice, especially, Table C., No. 45: "Miles of steel rails (reduced to single track) in main line." That certainly includes several parallel main lines.

It is urged by the respondents that the assessment is, according to the statute, to be made on the roads "according to their means." If this expression were to be taken as explaining the more definite language which follows, would it not be reasonable to hold, if there were two roads, having road-beds of equal length, and one road had one main track and the other two, that the "means" of the latter were double that of the former? Indeed, the argument of the respondents expressly says that the intention of the legislature was to assess this remaining one-half "upon the length of their respective road beds." Thus the respondents show that different language would accurately express what they claim to have been intended.

We think that the assessment upon the relators should be reduced in accordance with these views. The amounts are a matter of calculation and will be stated in the order.

Fifty dollars costs and disbursements to relators.

LONDON, J. :

The relators have been assessed for too much. It is no answer to their complaint that others have been assessed too little, unless it appear that the public interests would, by correcting this wrong, suffer greater wrong. It does not so appear in this case. The relators' assessment can be reduced to its proper amount, and should be.

Assessments modified and reduced as follows (see p. 5, Mr. Kerr's brief), with fifty dollars costs and printing disbursements.

BOOKES, J. (dissenting) :

The law here brought under examination (Laws of 1882, chap. 353) provides for an assessment of the expenses incurred by the board of railroad commissioners, to be imposed and collected pursuant to a

provision contained in section 13 of that act, which is as follows: "Such expenses shall be borne by the several corporations owning or operating railroads, according to their means, to be apportioned by the comptroller and State assessors, who, on or before the first day of July in each year, shall assess upon each of said corporations its just proportion of said expenses, one-half in proportion to its net income for the year next preceding that in which the assessment is made, and one-half in proportion to the length of main track or tracks on road, and such assessment shall be collected in the manner provided by law for the collection of taxes upon corporations."

The *certiorari* in this case is brought to review the action of the comptroller and State assessors in making an assessment upon the railroad companies under this provision; and the error charged is this: That the defendants did not follow the law, in that they omitted to assess the one-half of the expense upon the entire main track of the roads, but made the assessment according to the length of the line of road-bed, there being in some instances several lines of main track laid and used thereon.

We are of the opinion that the question in dispute is not properly before us in this proceeding, and that the *certiorari* should be quashed, and for two reasons: First. This law imposes no judicial duty upon the officers named as regards the subject in controversy. The action required of them is but ministerial. They are given no discretion on the subject, nor is there any fact to be judicially determined by them as a basis for their action, as regards the alleged error here complained of. The law itself declares precisely what shall be their action, and gives the entire basis for their action. The error here complained of, if well grounded, may, perhaps, be reached and corrected by *mandamus*; but as to this we give no opinion. It is sufficient here that the relators are not entitled, in this proceeding, to the relief demanded, even if correct in their allegations of error.

The *certiorari* should be quashed, with fifty dollars costs and disbursements against the relators.

Assessments modified and reduced according to opinion. Order to be settled by LEARNED, P. J.

MARY J. DARROW, RESPONDENT, v. FAMILY FUND  
SOCIETY, APPELLANT. \*

*Provision avoiding an insurance policy in case the assured shall die in the violation of, or the attempt to violate, any criminal law—the assured does not violate such a provision by committing suicide—Penal Code, secs. 178, 178.*

This action is brought by the plaintiff upon a policy of insurance or bond issued by the defendant, a corporation organized under chapter 175 of 1883, by which it agreed to pay to the plaintiff, the wife of one James H. Darrow, "within sixty days after the receipt of satisfactory evidence to the society of the death of the within named member, during the continuance of this bond in full force, \* \* \* five thousand dollars from the death fund of this society at the time of said death, as hereinbefore mentioned and provided." It further provided as follows: "This bond shall be void if the member named herein shall die in consequence of a duel or by the hands of justice, or in violation of, or attempt to violate, any criminal law of the United States, or of any State or country in which the member herein named may be." Upon the trial the judge excluded evidence offered by the defendant to show that Darrow committed suicide, upon the ground that that would not be a defense to the action.

*Held*, that he did not err in so doing. (LEARNED, P. J., dissenting.)

Neither suicide, nor the successful attempt to commit it, is made a crime by the Penal Code of this State. (Per LANDON, J.)

APPEAL from a judgment in favor of the plaintiff, entered at the Saratoga Circuit upon a verdict directed by the court, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

This action was brought upon a policy of insurance or certificate of membership issued by the defendant, a corporation organized under chapter 175 of the Laws of 1883, upon the life of James H. Darrow for the sum of \$5,000.

The policy, or as it is styled by its own terms the bond, bears date January 14, 1885, is issued under the corporate seal and the signatures of the vice-president and secretary of the defendant, and, among other things, binds the defendant to pay to the plaintiff (then the wife, now the widow, of the insured), "within sixty days after the receipt of satisfactory evidence to the society of the death of the within named member, during the continuance of this bond in full force, \* \* \* five thousand dollars from the death fund of this society, at the time of said death, as hereinbefore mentioned and

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\* See post, p. 252.

provided." The defendant is what is known as an assessment insurance society, and the scheme of raising the funds to pay the death claims is set out in the bond and is as follows: "Whenever the death fund is insufficient to meet the existing claims by death, a call shall be made upon this entire class of membership in force, \* \* \* but not more than one call shall be made to meet one death claim. Eighty per cent of the net amount received from such call shall be deposited in a bank and be used for the payment of death claims only, and the remaining twenty per cent shall be set apart as a reserve fund and deposited in a trust company to be accumulated to meet any contingency that may arise by reason of extra mortality, if any." The bond further provides as follows: "This bond shall be void if the member named herein shall die in consequence of a duel or by the hands of justice, or in violation of, or attempt to violate, any criminal law of the United States, or of any State or country in which the member herein named may be."

The answer tendered but two issues that are material to this appeal: First. That the bond was made payable only out of the death fund, and payment was conditioned on the sum being realized from an assessment, and that there was not any money in the death fund applicable to the payment of the bond. Second. That the bond was void if the deceased should die in violation of, or attempt to violate, any criminal law of the United States, or of any State or country in which he might be, and that he died in the State of New York from the effects of poison taken and administered by himself with intent to take his own life in violation of the criminal law of the State. For the purpose of showing suicide of the deceased the defendant offered certain evidence, to which the plaintiff objected on the ground that suicide was not one of the causes specified in the policy which would avoid it, and was no defense to the action. The court sustained the objection.

*George Wilcox*, for the appellant.

*Edgar T. Brackett*, for the respondent.

LONDON, J. :

The question is whether the insured died "in violation of, or attempt to violate, any criminal law of the United States, or of any



State or country in which the member may be." I think that suicide, or the successful attempt to commit it, is not made a crime by our Penal Code. "A crime is an act or omission forbidden by law and punishable upon conviction by," etc. (Sec. 3.) "Although suicide is deemed a grave public wrong, yet, from the impossibility of reaching the *successful* perpetrator, no forfeiture is imposed." (Sec. 173.) Attempting suicide is made a crime. (Sec. 178.) It is thus defined: "A person who, with intent to take his own life, commits upon himself any act dangerous to human life, or which, if committed upon or towards another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide." (Sec. 174.) It seems to follow that the attempt to commit suicide, if successful, is suicide and no crime, but only "a grave public wrong," but if unsuccessful, is a crime. Section 685 — which provides that "a person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court in its discretion discharges the jury and directs the defendant to be tried for the crime itself" — can, from the nature of the case, have no application to an attempt to commit suicide. The attempt is the crime itself. To bring it within the section there should be an attempt to attempt to commit suicide. If there is an attempt to commit suicide, the success of the attempt does not consummate the crime, but avoids it. How could the jury be discharged and the defendant be tried for the crime itself? What crime? The section must be limited to the cases to which it can apply.

The objection that this action, being at law, could not be maintained because there was not sufficient proof of money in the death fund of the defendant, is satisfactorily answered in the opinion of the presiding justice.

I advise an affirmance of the judgment and order.

BOCKES, J.:

The condition in the "bond" counted on is as follows: "This bond shall be void if the member named herein shall die \* \* \* in violation of or attempt to violate any criminal law," etc.; that is, shall die in violating or in attempting to violate any criminal law. Admit, as it must be admitted under the exceptions to the exclusion

of evidence, that Darrow committed suicide: was this condition broken? It would not be broken by the act of suicide; for suicide, although "a grave public wrong," is not within the reach of criminal law. (Penal Code, § 173.) But did he not, under the above admission, attempt suicide, which is itself a crime? (Penal Code, §§ 174, 178.) Certainly he did; yet he did not die in the commission of the *attempt* as an independent *act*. The attempt as an independent *act* is the crime declared by law; that is an unsuccessful act, having suicide for its consummated purpose. It is the unsuccessful act which is made punishable as a crime (sec. 178), not the successful act, which is beyond the reach of punishment under municipal law. An attempt implies a want of successful purpose. Of this Darrow did not die. He died of a successful purpose. He, therefore, did not die of the attempt, which, as a separate and independent act, is by law declared to be a felony, and made punishable as such. The offense contemplated by the Criminal Code (the attempt) is an offense for which the offender may be punished by imprisonment in the State prison. Such was not Darrow's offense. The mere reading of section 685 of the Penal Code shows the inapplicability of that section to this case. That provides for an act which the perpetrator survives. It must follow, therefore, that he did not die "in violation" of that provision of the Criminal Code (and there is no other applicable to the case), which makes an attempt to commit suicide an offense for which punishment is provided. As above suggested, this provision of law had in contemplation a punishable offense, to wit: an attempt, without success, to commit suicide; and, as is also above suggested, of this he could not die. If the above conclusion be sound, proof that Darrow committed suicide would not show that he died "in violation of or attempt to violate any criminal law," because of which, according to its provisions, the "bond" in suit would be void.

It may be added that there was proof of money belonging to the death fund, applicable to the "bond" in suit, to the extent of the recovery.

The judgment and order appealed from should be affirmed, with costs.

LEARNED, P. J. (dissenting)

This is an action on a policy of insurance or certificate of membership or bond, issued by defendant to James H. Darrow. The

THIRD DEPARTMENT, NOVEMBER TERM, 1886.

defendant is incorporated under chapter 175, Laws of 1883, and does the business of life insurance on the co-operative or assessment plan. By the policy of insurance (or bond, as defendant calls it) the defendant, within sixty days after evidence of the death of Darrow, was to pay the plaintiff \$5,000 "from the death fund of the society at the time of said death, as hereinbefore mentioned and provided." It was further provided therein that whenever the death fund is insufficient, a call should be made on members. Eighty per cent of the amount received should be used for payment of death claims, and twenty per cent should be set apart as a reserve fund, to meet any contingency by reason of extra mortality. No special sum is mentioned which is to be called for in case of deficiency in the death fund. It must be understood that so much shall be called for that eighty per cent shall be sufficient to pay the death claim. It is further provided in the bond that it shall be void if the member named therein "shall die \* \* \* in violation of, or attempt to violate any criminal law \* \* \* of any State or country in which the member herein may be."

Two defenses are set up: First. That there was not sufficient money in the death fund. Second. That Darrow committed suicide. The judge excluded evidence on the latter point on the ground that it was no defense, and ordered a verdict for plaintiff, and the defendant appealed. In considering the second defense we remark that the case of *Fitch v. The American Popular Life Insurance Company* (59 N. Y., 557) is not to the point. There was nothing in that policy in that case which made suicide a defense. *Patrick v. Excelsior Life Insurance Company* (67 Barb., 202) does not apply. That held that "the known violation of any law" was a phrase which did not include suicide. It is not necessary to consider that suicide was a felony at common law, punishable by forfeiture of goods (4 Bl. Com., 189), because section 2 of the Penal Code declares what shall be crimes after that Code takes effect. Section 174 declares that any person who, with intent to take his own life, commits upon himself any act dangerous to human life, or which, if committed upon or towards another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide. Section 178 provides for punishment. Section 684 provides that a person may be

convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court in its discretion discharges the jury and directs the defendant to be tried for the crime itself. Hence it follows, under the Penal Code, that the attempt to commit a crime is not so merged in success that the defendant may not still be punished therefor. It is true that when an attempt to commit suicide has been successful the guilty person cannot be punished because he is dead. That is the case with every criminal. He cannot be punished for his crime if he dies before trial.

Evidence was offered at the trial which, if admitted, might have shown that the deceased violated the above cited section 174 of the Penal Code. If, with intent to take his own life, he took poison, then he was guilty of the crime specially declared by that section. There is a general provision in section 686 as to unsuccessful attempts to commit crimes, regulating the punishment by reference to this punishment imposed on the crime itself.

But section 174 is an independent enactment, declaring certain acts to be crimes, and section 178 declares the punishment, with no reference to the crime said to be attempted. If, then, the deceased had done the act, of which evidence was offered, and he had lived for several months afterwards, he might, during his life, have been indicted and convicted under that section 174.

It must be noticed that the provision of the policy specifies death in violation of a criminal law, and also death in an attempt to violate such law. Either of these makes void the policy. Nor is it therein expressly required that the attempt to violate be itself a crime. Now the evidence excluded tended to show a violation of a criminal law, and not merely an attempt to violate. *Attempting suicide is itself a crime, and not accurately an attempt to commit a crime.* (Sec. 34.) And the reason why the law was thus drawn was probably from the doubt whether suicide was a crime.

The question then arises, did the deceased die in violation of a criminal law? Of course the language used in the policy cannot have a literal meaning. It cannot mean to express a case where the insured was forbidden to die by some criminal law, and where his death was therefore in violation of the law. It must indicate a case where the death occurs in consequence of or in the course of

the violation of a criminal law. As, for instance, if the insured were committing a burglary, and were killed in the act, and in consequence thereof. The object aimed at in this provision of the policy is that the company shall not be liable when the death of the insured is his own criminal fault. Thus the other circumstances which make the policy void are death in a duel or by the hands of justice. By analogy with these we may see that to die in violation of a criminal law means to die by reason of, or in consequence of, or in course of, a violation of a criminal law.

Now the evidence excluded tended to show that the deceased did commit the crime of attempting suicide, and that in consequence of such attempt he died. It is argued by plaintiff that one cannot die in the *attempting* suicide. But may not one die in the commission of a burglary? Does not one die in violation of law when he dies in direct consequences of such violation? What other reasonable meaning can this provision have?

It is argued for the plaintiff that the evidence shows that the deceased not only committed the crime of attempting suicide, but that he succeeded. And the plaintiff argues that suicide is not a crime under the definition in section 3, Penal Code, and the statement in section 173. But the answer is that the Penal Code, as already shown, makes certain acts to constitute a certain crime, viz., that of attempting suicide. And the person who commits those acts is, at the very time of committing, guilty of that crime, although it may be that the consequence of his crime will be such that he cannot be punished. The man who attempts to commit a murder is none the less guilty if he himself be killed in the attempt, and if he, therefore, cannot be punished. If this deceased had thrown a dynamite bomb into a crowd, with intent to kill some person, and the explosion had killed no one but himself, would he not have died in the attempt to violate a criminal law?

The plaintiff argues that if the deceased succeeded in committing suicide he passed beyond any crime and did that which, by the Penal Code, is no crime. But (assuming the evidence to prove what is claimed) he did the acts set forth in section 174, that is, with intent to take his own life, he committed on himself an act dangerous to human life. Therefore he committed the crime by that section defined. If he died a month or an hour afterwards, had he any the

less committed a crime? I am of the opinion that evidence tending to prove that the deceased committed the crime of attempting suicide, and that he died in consequence thereof, should have been admitted. There was a general exclusion of such evidence and, therefore, I do not specify any. On the other point, viz., that there was not sufficient money in the death fund, these facts must be noticed. Darrow died December 11, 1885. A call was made March 4, 1886, reciting Waas' death, which showed a balance on hand of \$1,807.58. This call produced for the death fund \$11,282.48. Waas' claim was \$5,000. By a subsequent call of May 1, 1886, reciting the death of one Arnold, February 18, 1886, it appears that part of the residue had been applied to a Dewey claim, and on this claim. The society does not make a call on every death, but only when the death fund is insufficient. The call made upon Waas' death after paying his claim would place in the death fund over \$8,000. If there was money in the death fund from which plaintiff's claim could be payable (and it became payable about March 14, 1886), then there would be no defense on that ground, though there had been a diversion to other objects. There was, we think, evidence enough, in the absence of any contradictory evidence, to establish the plaintiff's case on this point.

For the reasons above given I think there should be a reversal of the judgment and a new trial, costs to abide the event.

Judgment affirmed, with costs.

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SUSAN M. FREEMAN, RESPONDENT, v. THE NATIONAL  
BENEFIT SOCIETY OF NEW YORK, APPELLANT.

*Mutual benefit association — suicide is not a violation, or an attempt to violate, a criminal law — duty of a corporation to make an assessment to pay death claims — when a report made to the insurance department is admissible in evidence against the association — the person receiving the amount need not have an insurable interest in the life of the member.*

The decision made by this court in the case of *Darrow v. Family Fund Society* (*supra*, p. 245), holding that the suicide of a member of a corporation organized under chapter 175 of 1883, did not come within the meaning of the provision contained in the certificate, that it should be void if the assured should die

"in the violation of, or attempt to violate, any criminal law," reaffirmed and followed.

By a certificate of insurance issued by the defendant there was to be paid to the plaintiff, "if living, \* \* \* in ninety days after due proof of the death of said member, a sum equal to the amount received from a death assessment, but not to exceed three thousand dollars;" and the fourth condition thereof provided that "the death claim under this contract shall be payable in ninety days, after satisfactory proof of the death of the said member shall have been furnished," as therein provided. The defendant objected to the right of the plaintiff to maintain the action to recover this amount upon the ground that the promise to pay was contingent, the beneficiary being restricted to a fund to be procured by an assessment, and that no proof of the existence of such fund was given.

*Held*, that these objections were properly overruled for the following reasons:

*First*. That the requirement that payment was to be made in ninety days implied that there was an obligation on the part of the company to proceed and make the necessary assessment to raise the fund.

*Second*. That as the defendant had the power to make the assessment, it could not resist the payment of the plaintiff's claim by omitting to make it.

*Third*. That the furnishing of satisfactory proof of the death of the member to the society, according to the provisions of the certificate issued to him, should be held to be a demand for payment, and impliedly a demand upon the company to procure the necessary funds by an assessment, if that were necessary. Proof that an assessment upon the members liable to contribute to the death fund, would have produced a fund sufficient to pay the plaintiff's claim, was given by the production of the report of the society made to the State Insurance Department a few days before the member's death.

*Held*, that an objection by the defendant to its reception, on the ground that it was not the best evidence of these facts, and that the books of the company should be produced, was properly overruled, as the report made, as required by law, was of equal dignity and certainty with the records of the society. It was also objected that the plaintiff could not recover, because it was not shown that she had any insurable interest in the life of Darrow.

*Held*, that it was not necessary that she should have any such interest.

*Massey v. Mutual Relief Society* (102 N. Y., 528; affirming 84 Hun, 254) followed.

APPEAL from a judgment in favor of the plaintiff, entered at the Saratoga Circuit, upon the verdict of a jury.

*Louis P. Levy*, for the appellant.

*Edgar T. Brackett*, for the respondent.

BOOKES, J.:

The decision in the case of *Mary Jane Darrow v. Family Fund Society*, argued at the last term of this court, and now just handed

down, \* disposes of the leading question here presented, favorably to the plaintiff.

According to that decision the trial judge correctly rejected all proof touching the subject of Darrow's alleged suicide, and rightly held that suicide by Darrow, if proved, would not avoid the certificate of membership issued by the defendant to him, under the provision declaring that the contract should be void if the assured should die "in the violation of, or attempt to violate any criminal law," etc. For the grounds of this conclusion we refer to the opinion written in that case.

By the certificate, payment was to be made to the plaintiff, if living, in ninety days after due proof of the death of Darrow, of "a sum equal to the amount received from a death assessment, but not to exceed three thousand dollars," and by the fourth condition, upon which the certificate was issued and accepted, it was provided that "the death claim under this contract shall be payable in ninety days after satisfactory proof of the death of the member shall have been furnished in the manner then declared." Evidence was given to the effect that such proof was duly furnished, and that the action was not commenced until the expiration of ninety days therefrom.

It is urged that the provision to pay was contingent, not absolute, as payment was to be made out of a special fund, the death fund, to be procured from an assessment of the members of the society, and that the beneficiary was restricted to the fund thus specified; and, further, that there was no proof of the existence of such fund. It may well be that the beneficiary would be thus restricted, in case of due effort by the society to assess its members liable to assessment therefor. An omission to make an assessment which, if made, would produce a fund equal or greater than the claim, would create an obligation against the society, the same as if it had the fund on hand from which to make payment. It could not lie by and omit to put in operation the means possessed by it to obtain the fund and omit payment because of its own neglect of duty. This would be to take advantage of its own wrong, and it would operate as a fraud on the beneficiary under the certificate, since the obligation to raise the fund by assessment, when shown to be

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\* See case preceding this, page 245. [RE.]



adequate for that purpose, would take the place of the fund in determining the question of liability.

So, too, the furnishing of satisfactory proof of the death of the member to the society, according to the provisions of the certificate issued to him, should be held to be a demand for payment, and impliedly would also be a demand upon the company to procure the necessary fund by assessment if need be. It should be further observed that according to the fourth condition upon which the certificate was issued and accepted, payment was to be made absolutely in ninety days after satisfactory proof of the death of the member was duly furnished to the society. So, too, the provision in the body of the certificate, that payment should be made of a sum equal to the amount received from a death assessment, not to exceed the sum specified, in ninety days after due proof of the death of the member was given, implies an obligation upon the company to proceed and make the necessary assessment to raise the fund within the time during which it was provided that the claim should remain in abeyance. For all these reasons, the objection to a recovery, on the ground that there was no proof of the existence of a death fund from which payment could be made, must be held of no avail.

Proof was given showing *prima facie* that an assessment upon the members liable to contribute to the death fund would have been adequate to the case of the beneficiary in this case. This proof was the report of the society made to the State insurance department but a few days after Darrow's death. This evidence was objected to as not the highest or best evidence of the facts stated therein; that the books of the society should have been produced. The report so made was, however, of equal dignity and certainty with the records of the society. It was made up by the society from its records — indeed, was itself a record required by law to be made by the society and filed in the insurance department as a record. It was, therefore, competent evidence of the facts therein stated and certified, and the evidence of Mr. Brackell went merely to calculations in elucidation of those facts, in connection with the table of the defendant's assessment rates, which evidence and table, it seems, were received as proof without objection. The report to the insurance department, with the other

proof above referred to, made a *prima facie* case against the defendant on the point of its ability, with due diligence, to raise a death fund sufficient to answer the claim in suit; and no proof whatever was given or offered to gainsay such *prima facie* case.

If it might have been the case, as is suggested by the defendant's counsel, that all persons who were members of the society December 31, 1885, when the report to the insurance department was made, were not also members when Darrow died, but twenty days previously; and that the members named in the report may not have been solvent and able to pay an assessment if one had been made; or, that each and every assessment would have been paid if made — these were matters to be shown by the defendant against what was fairly inferable from the case as made by the plaintiff on the evidence submitted. The report was made during the time within which there should have been an assessment to meet and answer the plaintiff's claim. It was, therefore, to be inferred, in the absence of all proof to the contrary, that it contained the facts constituting a proper and adequate basis therefor.

It is further urged that the plaintiff, the person to whom payment was to be made, had no insurable interest in the life of Darrow. This fact was wholly unimportant to the defendant's liability, inasmuch as one may take out a policy of insurance upon his own life and make it payable to another having no interest whatever in the life of the insured. This doctrine of the law has been settled in numerous cases. (*Olmsted v. Keyes*, 85 N. Y., 593, on page 600; *Massey v. Mut. Rel. Soc.*, 34 Hun, 254, and cases there cited on page 256; affirmed in Court of Appeals, 102 N. Y., 523.) It may be added that no point is made by the defendant's counsel as respects due notice to the defendant of Darrow's death.

The judgment should be affirmed, with costs.

LEARNED, P. J., and LANDON, J., concurred.

LANDON, J. :

The insured was the same person who was insured in the case of *Darrow v. Family Fund Society*, and the language of the policy respecting the death of the insured in the violation of, or attempt to violate any criminal law, is identical with the language in the

policy in that case. Our decision in that case, that suicide did not come within the terms of the language employed, is decisive of the same question here.

The certificate of insurance in this case contains a contract on the part of the society to pay to the plaintiff, in ninety days after due proof of the death of the member, "a sum equal to the amount received from a death assessment, but not to exceed three thousand dollars."

No assessment was levied by the society to meet the claim of the plaintiff, but it was proved that if such assessment had been levied and collected it would have exceeded \$3,000. The defendant objects that an action at law will not in such case lie to recover the \$3,000, but only an action in equity to compel the society to levy and collect the amount and then pay it to the plaintiff.

But the contract was to pay a certain sum, not to cause it to be levied and collected; it was not an agreement to pay from a special fund to be provided, but to pay absolutely, and the reference to the "amount received from a death assessment," is one of the methods of measuring the amount to be paid. Whether that assessment shall be levied in each case of death is a matter for the society to determine. Here it is shown that the amount payable is less than an assessment fully collected would realize. Whether there is in the death fund an accumulation of like margins from previous assessments is best known to the defendant. The printed rules of the defendant provide that "no assessment is to be made in either class while there remains unclaimed in the death fund of the class a sum sufficient to pay the maximum amount of benefit." That no assessment was made with reference to this case is some evidence that none was necessary.

The objection that the plaintiff was not shown to have an insurable interest in the life of the insured was met by the recital in the application that she was a creditor. This was the only evidence upon the point, and, therefore, was not contradicted. But the plaintiff did not procure the insurance; the insured did that, and named the plaintiff as beneficiary. There was nothing in the charter or statute under which the society was organized forbidding the insured to make the policy payable to whomever he should appoint, and there is no evidence tending to impeach the good faith of the

transaction on the part of the insured. The defendant, therefore, must pay as it has agreed. (*Olmsted v. Keyes*, 85 N. Y., 593; *Bickerton v. Jaques*, 28 Hun, 122; *Massey v. Mutual Relief Soc.*, 102 N. Y., 523.)

The act of the legislature under which the defendant was organized was examined in the case last cited, and nothing found in it requiring the insured to restrict his beneficiary to a person having an insurable interest in his life.

The judgment should be affirmed, with costs.

LEARNED, P. J., and BOOKES, J., concurred.

LEARNED, P. J.:

Since the important question in the case has been decided in plaintiff's favor in the case of *Darrow v. Family Fund Society*, contrary to my own views, I concur in this opinion.

Judgment affirmed, with costs.

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JOHAN JOST BECKER AND OTHERS, RESPONDENTS, v.  
WALTER S. CHURCH, APPELLANT.

*Summary proceedings to recover possession of land — when the validity of a lease may be attacked in such proceedings, by the defendant, for fraud — when an equitable action to cancel the lease will lie.*

This action was brought by the plaintiff to have a paper executed by the parties to this action, which purported to change the relation existing between them from a tenancy from year to year to a tenancy at will, set aside on the ground that it was procured by fraud, and to restrain the defendant from further proceeding, in certain summary proceedings instituted by him, to remove the plaintiff from the possession of the demised premises. Upon the trial it appeared that on or before July 5, 1882, the plaintiff Becker was a tenant of the defendant Church; that on that day the plaintiff was induced by fraud to execute a paper purporting to change such tenancy to a tenancy at will; that in May, 1883, Church, after serving a notice to quit, pursuant to the statute to terminate a tenancy at will, instituted summary proceedings to dispossess Becker, whereupon the latter brought this action and recovered therein a judgment, from which this appeal was taken.

*Held*, that the judgment should be affirmed. (LONDON, J., dissenting.)

*It seems*, that the question as to whether or not the alleged lease was procured by fraud could have been tried in the summary proceedings. (Per BOOKES and LONDON, JJ.; LEARNED, P. J., *contra*.)

APPEAL from a judgment, entered in Albany county, upon the report of a referee granting an injunction restraining the defendant from proceeding, in summary proceedings instituted by him, to remove the plaintiffs from certain premises in the town of Berne, by reason of the alleged expiration of the term of their tenancy, and canceling and setting aside an alleged lease on the ground that it was procured by fraud.

*S. W. Rosendale*, for the appellant.

*W. & G. W. Youmans*, for the respondent.

LEARNED, P. J. :

I assume for the present that on and before July 5, 1882, Becker was tenant from year to year of Church; that on that day a paper was executed between the parties which purported to change such tenancy to a tenancy at will; that such paper was, as the referee finds, obtained from Becker by fraud. Thereupon, in May, 1883, Church served a notice to quit upon Becker, pursuant to the statute to terminate a tenancy at will, and proceeded to take summary proceedings thereunder to dispossess Becker.

Now upon those proceedings, that paper would have been proof against Becker that he was such tenant at will. Could he in those proceedings have shown that that paper was obtained by fraud? Is he, therefore, forbidden to maintain this action, which is brought both to set aside and cancel that paper, and also to restrain the summary proceedings? Now I suppose that an action in equity will be maintained for the purpose of setting aside and canceling an instrument affecting title to land and obtained by fraud. (Pomroy's Eq., §§ 110, 399; Story's Eq., §§ 694, 700; Potter's Willard's Eq., m. p., 304.)

As part of the remedy, actions or proceedings on the fraudulent instrument will be enjoined. But could the county judge try the question of fraud in the obtaining of the instrument? He has jurisdiction to pass on the legal title only, and not on an equitable title. (*Terrett v. Cowenhoven*, 11 Hun, 320; *People ex rel. Ainslee v. Howlett*, 13 id., 138.) This latter case was affirmed (76 N. Y., 576), and the decision there, made by only four out of seven judges, goes to the point that the defendant, by alleging facts, showing that the

so-called lease was void for usury, set up a defense that denied the conventional relation of landlord and tenant, and that such an issue should have been tried by a jury.

Now, if we look at the Code (sec. 2244) it will be seen that the person against whom summary proceedings are taken may put in an answer denying generally the allegations, or specifically, any material allegation. He is, therefore, limited to denials. And there is no provision for affirmative allegations. Suppose, then, that the petitioner alleged a tenancy at will, and the respondent denied it. On the trial of that issue could the respondent have been permitted to show that the alleged lease was obtained by fraud, and was, therefore, *voidable*, not *void*, as in a case of usury? I find no case where it has been held that any question, such as here arises, can be tried in summary proceedings.

It seems to me then that if the alleged instrument was obtained by fraud, as it affected Becker's title to land, he might maintain an equitable action for its cancellation, and as a part of the relief therein, might restrain proceeding upon it. Nor do I think that fraud in obtaining an alleged lease is an issue to be tried in summary proceedings.

As my brother BOOKES concurs with me in the former of these two propositions, the judgment is affirmed, with costs.

BOOKES, J.:

I concur with my brother LONDON in his opinion as to all subjects discussed by him thereafter considered.

The summary proceeding here enjoined had its basis on the writing between the parties of July 5, 1882. The defense interposed in such proceeding by the present plaintiffs, Becker & Engle (their defendants) was, that such written agreement was void for fraud in its procurement.

Before the final order, in favor of the present defendant, the plaintiff in said proceeding, was signed by the officer before whom it was conducted, this action was brought for a double purpose, first, to have the written agreement adjudged fraudulent and void; and, second, to enjoin the further proceeding to remove the present plaintiff as tenant in default thereunder.

The referee, before whom this action was tried, found for the

plaintiffs, that the paper was void for fraud, directed its cancellation; also, that the defendant be enjoined from further action in the proceeding having for its basis such void instrument.

Now, I accept the conclusion reached by the referee and approved by my brother LONDON in his opinion, that the written instrument was void for fraud; and I further concur in the conclusion reached by the learned judge that the invalidity of that instrument, because of fraud in its procurement, was proper matter of investigation in the summary proceeding. I am of the opinion that this point is determined in the *People v. Howlett* (76 N. Y., 574). It is there said, in approval of the doctrine laid down in *Roach v. Cosine* (9 Wend., 228), that the cases tend in the direction of permitting evidence going behind the formal character of the instruments in order to ascertain the real nature of the transaction, and a remark is added, which, here as there, has especial signification: "It is to be observed, however, that in proving the letting the real facts were developed," etc. Thus, in this case, the proving of the instrument opened up and let in the proof which showed it void for fraud. It may be well to quote further from the case cited, as the reasoning is here applicable: "It is urged that the tenant can only prove what is admissible under a simple denial of the facts, and that usury can never be shown unless pleaded. We think that this construction is too narrow. Usury renders the lease void. It is not a lease, and there can be no tenancy by virtue of a nullity, and a denial of the lease, and the tenancy entitles the party to prove the facts which render it void. He may show that it was obtained by duress under such denial." (P. 580.) These remarks have direct application, as I think, to the subject under consideration. I am, therefore, of the opinion that proof to the effect that the instrument, relied on as a basis for the summary proceeding against the plaintiffs was void for fraud in its procurement, was competent matter of defense in that proceeding. But I am further of the opinion that, although there admissible, hence subject to review on appeal, it does not follow that this action will not lie in its present form and for the purposes for which it was instituted. The ground of action is the alleged fraud in the procurement of the writing, and the relief sought is its cancellation because of such fraud. This end could not be attained in the summary

proceeding. The ground of action is, too, undoubtedly of equity cognizance.

The court had jurisdiction in the case. Now, having jurisdiction as to the gravamen of the action and the relief sought to be obtained, all collateral matters growing out of it, within the scope of the equitable powers of the court, were matters to be redressed if justice so demanded. If need be, the Court of Equity will extend the remedy in the particular case so as to make relief complete. So, if an instrument be adjudged void, it may and should enjoin all future action based upon it.

Holding to this view of the case, I think the judgment should be affirmed, with costs.

LONDON, J. (dissenting):

This is an appeal from a judgment entered upon the report of a referee, granting an injunction restraining the defendant from proceeding further in certain summary proceedings instituted by him to remove the defendants from certain premises in the town of Berne, by reason of the expiration of the term of tenancy. Four acres of the premises are the same which we have considered in the case of *Church v. Schoonmaker*, and were held by plaintiff subject to the rents reserved in the Post lease of 1795. The other portion consists of one acre adjoining the Post parcel. This acre had originally belonged to Stephen Van Rensselaer; had been leased by him to one Kast, and in 1842 was by deed conveyed by Kast to Van Rensselaer. At that date Paul Settle was occupying the Post four acres as tenant of Van Rensselaer, and it seems he went into possession of the Kast parcel as tenant, but without any written lease. The Post parcel was upon one side of a creek, and the Kast parcel on the other side directly opposite. The Post parcel had been known and used as a mill lot, and when Paul Settle went into the occupation of the Kast parcel he built a new mill upon the Kast parcel, and the old mill went to decay or was torn down. Thereafter both parcels were used in part as a mill lot.

The term of sixteen years mentioned in the Post lease of 1795 expired in 1811, but thereafter, without any written renewal of the lease, the Post parcel was occupied under the same terms, as to rent, until some time before 1842, when the rent was raised to sixty



dollars. After Paul Settle went into possession of both parcels he paid rent at the rate of sixty dollars per year without any specification of the amount charged upon either parcel. In 1851, Paul Settle conveyed his interest in both parcels to Edward Settle, who continued to occupy and pay the same rent. He paid rent in full "on said lands," as the referee finds, up to January 1, 1860. The referee finds that it does not affirmatively appear from whom Settle derived title to the Kast parcel, or by what tenure he held it.

It is apparent, however, from the facts found by the referee, that both Paul and Edward Settle held the Kast parcel under Van Rensselaer and as his tenant, and, further, that the rent of both the Kast and Post parcels was sixty dollars per year. On the 27th of March, 1860, Edward Settle conveyed both parcels to the plaintiff by quit-claim deed, both parcels being separately described, the Post parcel being subject to the rents in the Post lease, but no mention of tenancy being made with respect to the Kast parcel.

The referee finds that on the 5th day of July, 1882, the plaintiff did not know the amount of rents reserved in the Post lease, and did not know that any rents were reserved upon the Kast parcel. The rent, on the 5th day of July, 1882, had remained unpaid from January 1, 1860. Church became the grantee of the Van Rensselaer title February 21, 1882. In May following Church agreed to take, and the plaintiff agreed to give, \$1,200 "for all arrears of rent." The plaintiff paid Church \$1,008.75 upon this agreement July 5, 1882.

Upon these facts no question of adverse title or of champerty can arise. Becker, by paying \$1,008.75, upon "all arrears of rent," attorned to Church and admitted that he had held under the Van Rensselaers and now held under him. The plaintiff's quit-claim deed was not inconsistent with the tenancy, and when rent was demanded of him he agreed to pay it and did.

The referee does not find that the \$1,008.75 was paid under a mistaken impression that it referred only to the Post parcel. The plaintiff testifies that when the \$1,200 was agreed upon "there was something said, concerning that should be all the claim against the whole place." The plaintiff also told Church "that he would pay his rent thereafter, there would be no more trouble." Since he was to pay rent thereafter, it probably did not occur to him

that it made any difference whether he paid the sixty dollars per year upon both parcels or upon one of them.

We ought not, in support of the judgment, to presume that the referee found a fact which the evidence will not justify. The referee has rejected, as fraudulently procured, the paper executed by the plaintiff at the time he paid the \$1,008.75. This paper purported to change the tenancy from year to year to a tenancy at will. We see no reason to differ from the referee in his finding of fact in this respect.

The effect of it is to leave the tenancy from year to year existing in the same manner as if no paper had been executed. But such tenancy was not terminated by the service of the notice in May, 1883, requiring the plaintiff to quit the premises one month thereafter. Hence the summary proceedings could not be sustained. We have discussed the case on the merits, because the case of *Becker v. Church*, herewith argued, requires it.

But this was an objection which could have been taken in the proceedings themselves. The invalidity of the paper purporting to change the nature of the tenancy could have there been litigated. (*The People v. Howlett*, 76 N. Y., 574.)

The court will not, by injunction, restrain summary proceedings unless the tenant has some equity or defense of which the county judge has no jurisdiction. (*Knox v. McDonald*, 25 Hun, 263; *Jessurun v. Mackie*, 24 id., 624; S. C., 86 N. Y., 622; *Broadwell v. Holcombe*, 4 Civ. Pro. Rep., 159.) Here, all the facts insisted upon by plaintiff would have been competent as evidence in support of the issue before the county judge, and if error had been committed, the remedy was by appeal.

The judgment should be reversed, new trial granted, reference discharged, costs to abide event.

Judgment affirmed, with costs.

STEWART MAXWELL, RESPONDENT, v. HORACE INMAN,  
APPELLANT.

*Evidence*—the execution of a chattel mortgage is not proved by the production of a copy thereof and of a certificate of acknowledgment attached thereto, certified by the town clerk.

Upon the trial of this action of trover the plaintiff, who claimed title to the property under a chattel mortgage given by a former owner, put in evidence a paper, certified by the town clerk to be a copy of a paper on file in his office. The paper, the certified copy of which was received in evidence, purported to be a copy of the chattel mortgage, and of a certificate of acknowledgment as to its due execution. An objection of the defendant that the certificate of the town clerk did not prove the existence and execution of the original mortgage was overruled by the court.

*Held*, that it erred in so ruling.

*Bissell v. Pearce* (28 N. Y., 252); *Sunderlin v. Wyman* (10 Hun, 493); *Fellows v. Van Hyring* (28 How., 230) followed.

APPEAL from a judgment in favor of the plaintiff, entered in Montgomery county upon the verdict of a jury, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

*Stover & Nisbet*, for the appellant.

*E. J. Maxwell*, for the respondent.

BOOKES, J.:

This is an appeal by the defendant from a judgment rendered against him herein on the verdict of a jury for \$158-<sup>00</sup>/<sub>100</sub> and costs, and also from an order denying a motion to set aside the verdict, and for a new trial made on the judge's minutes.

The action was trover, for property consisting of pulleys, shafting and machinery, taken and converted by the defendant. The plaintiff, by his proof, made title to the property for which the recovery was had, under a chattel mortgage, of which he was assignee, to the extent of his recovery, made by the Phoenix Mills, a manufacturing corporation, to Samuel Blaisdell, Jr., & Co., dated December 30, 1884. The taking of the property by the defendant

was not controverted. The defense attempted to be made was this: That the defendant owned the property by a prior title, and he gave evidence of such title, to wit, a bill of sale and mortgage; the court sustained his defense in so far as the bill of sale and mortgage covered the property in question. Thus it became a question of fact whether the instruments under which the defendant made claim covered the property for which the recovery was had, and oral proof was given *pro* and *con* bearing on that question. The jury found for the plaintiff for some of the property, valued, according to the verdict, at \$158,100. This statement of the case would require an affirmance of the judgment, and this seems to be a correct statement of it, as respects the merits of the controversy.

It was objected that the transfer by Samuel Blaisdell, Jr., & Co. to the plaintiff was not well proved, because executed by one of the firm only. The instrument purported to be a sale and transfer by the firm. It was so stated in the body of the instrument. But for anything appearing to the contrary, the sale and transfer by one of the firm of firm property, not being real property, was good and effectual to carry title to the vendee. It was also objected that the mortgage, under which the plaintiff claimed, was not well proved. The paper put in evidence was certified in due form of law by the town clerk, in whose office it was filed. It purported to be a copy of the mortgage, and was with a certificate of acknowledgment of its due execution, filed in the town clerk's office as a copy. It was a paper authorized by law to be there filed as a record. The certificate of the town clerk, however, went only to the filing of the paper. (Code Civil Pro., § 934.) It did not prove the existence and execution of the original. (*Sunderlin v. Wyman*, 10 Hun, 493; *Fellows v. Van Hyring*, 23 How., 230; *Bissell v. Pearce*, 28 N. Y., 252.) The admission here in evidence of the mortgage, against objection and exception, without such proof, was error, because of which there must be a new trial.

There were other matters of exception besides those above considered — some as to rulings on questions of evidence, and some pertaining to the charge of the learned judge; none, however, presenting ground of error requiring comment. But for the error above noted the judgment must be reversed.

The judgment and order appealed from should be reversed and a new trial granted, costs to abide the event.

LEARNED, P. J.:

To maintain his case, the plaintiff offered in evidence a paper certified by the town clerk to be a copy of an original on file. The originals (of which a copy was thus certified) was an alleged chattel mortgage and an alleged acknowledgement thereof. The defendants objected that this was not evidence of the execution of the instrument.

Section 934 of the Code of Civil Procedure is to the same effect as 1 Revised Statutes ([1 Edm. ed., 323], m. p. 350, § 16). There is no change. And this provision of the Revised Statutes was in force when *Bissell v. Pearce* (28 N. Y., 252) was decided. It, therefore, did not modify or give greater effect to the provisions of chapter 279, Laws 1833, section 4. (See R. S. [7th ed], p. 2250, § 4.)

Now, it was held in that case, and again in *Sunderlin v. Wyman* (17 Sup. Ct. [10 Hun], 493), and in *Fellows v. Van Hyring* (23 How., 231), that a copy of a chattel mortgage, certified by the town clerk, was no proof of the execution of the mortgage. And this is necessarily so, because no proof of such execution need be on the instrument in order to require the town clerk to file it. Thus the case is different from that of conveyances of land. Nor is there anything in the statutes authorizing the filing of the acknowledgement of a chattel mortgage or the certifying a copy of such acknowledgement. It is otherwise as to deeds. (1 R. S., m. p. 760, § 26; 3 R. S. [7th ed.], 2220.) The town clerk has only to file any paper which appears to be a copy of a mortgage. If his certificate of a copy thereof is evidence, then the copy filed has more effect than the mortgage itself. Of course the "*original*," of which the town clerk certifies a copy, is the paper in his office; and this itself may be a pretended copy.

Section 934 of the Code of Civil Procedure is a general provision as to all papers, just as the corresponding provision was. (1 R. S., m. p. 350, § 16.) But the statute of 1833 specially provided as to the effect of certified copies of chattel mortgages or of copies of chattel mortgages. That statute has been construed, and construed correctly, and should be followed.

For this error, judgment reversed, new trial granted, costs to abide event.

LONDON, J., concurred.

Judgment and order reversed, new trial granted, costs to abide event.

LAURA E. THAYER, APPELLANT, v. STEPHEN GILE,  
RESPONDENT.

*Pleading — what allegations establish a cause of action for conversion.*

A complaint alleging, in substance — that on the 17th day of March, 1886, the plaintiff, as tenant in common with the defendant, was in the possession of a quantity of hay, and that the defendant, claiming to be the absolute owner thereof, then wholly converted the same to his own use, to the plaintiff's damage — states facts constituting a cause of action, and requires that a demurrer interposed thereto, upon the ground of its failure to state facts constituting a cause of action, be overruled.

APPEAL from a judgment entered in Columbia county, sustaining a demurrer interposed to the complaint, on the ground that it did not state facts constituting a cause of action, and from the order upon which the said judgment was entered.

The complaint states, in substance, that on and after October 1, 1885, the plaintiff was a tenant in common with the defendant in some forty or fifty tons of hay, which were then in the possession of plaintiff in the buildings on defendant's farm; that the defendant subsequently fed up and used up some portion of said hay; that on or about March 17, 1886, plaintiff asked for a division and for the one-half of the remaining portion of said hay, and "defendant refused to make such division, and refused the possession of any portion of said hay to plaintiff, and then and there claimed that the plaintiff had no interest in said hay, and that he, defendant, was the entire and absolute owner of said hay, and otherwise converted the same to his own use to the damage of plaintiff in the sum of three hundred dollars." The defendant demurred to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendant.

*W. H. Silvernail*, for the appellant.

*Nathaniel C. Moak*, for the respondent.

LANDON, J.

This complaint is very crudely drawn. It is redundant in statement of immaterial matters, and it lacks definiteness and certainty with respect to material matters. Nevertheless, it states in substance: that on the 17th of March, 1886, the plaintiff, as tenant in common with the defendant, was in possession of a quantity of hay (what was remaining of forty tols), which the defendant then wholly converted to his own use, to plaintiff's damage, etc.

How large a quantity, what share the plaintiff owned, and its value, are left uncertain. Still, since the defendant converted it all, he converted the plaintiff's share, and thus injured her to the extent of its value. There is an immaterial allegation of a demand of one half, but that is not an allegation that the plaintiff owned one half; also of a division, but the plaintiff could take her own share without demand of the defendant.

The material allegation is, the defendant's conversion. It is still good pleading to state facts according to their legal effect, unless the pleader so narrates the facts as to show that he has mistaken their legal effect, which is not quite the case here. Thus, it was not necessary for the plaintiff to allege the details from which her tenancy in common, or possession, or the conversion by the defendant would follow as their legal effect. These details are rather in the nature of the evidence, to be adduced upon the trial to support these three allegations.

A complaint must contain a plain and concise statement of the facts. No statement can be plainer or more concise than the statement that the defendant converted the plaintiff's hay. If the plaintiff gave a narrative of all the acts performed by the defendant in order to accomplish this conversion, it might be far from plain whether any conversion was in fact accomplished. The details of the transaction may very much obscure the fact of conversion.

Since the share of the plaintiff is not stated, it may be, that in order to establish conversion, the plaintiff will have to prove the loss, sale or destruction of the entire hay. (*Loddell v. Stowell*, 51

N. Y., 70; *Osborn v. Schenck*, 83 id., 201; *Dear v. Reed*, 37 Hun, 594.) By using the word "converted" the plaintiff has concisely condensed in a single word the notice to the defendant that whatever it may be necessary to prove she intends to prove it.

It is objected that the allegation of conversion is a conclusion of law and not of fact. Ordinarily, the narration of a transaction, whether by stating all the details of it or by stating these details according to their legal effect, is the narration of a fact. A statement of a conclusion of law is usually a statement of the right or liability flowing from certain facts.

Thus, A lent B a dollar is the fact, B owes A a dollar is the law. A converted B's hay is a fact; B's liability to A, the law. But from a given state of facts the law will pronounce that A converted B's hay. Is the statement of the conversion, therefore, the statement of a conclusion of law? It is rather the statement of a fact, ascertained by the rules of law. From the facts given, the law presumes the fact required, but the presumption is only a rule of evidence, and, by the application of that rule, the fact required is determined. The rule of evidence, by which the fact sought is found, is not the fact itself. The rule is the instrument or help through which the fact sought is discovered. If the rule is called a conclusion of law, then, by means of the conclusion of law, the conclusion of fact is established.

Judgment reversed, with costs of appeal and of court below. The defendant may have usual leave to answer.

LEARNED, P. J., and BOCKES, J., concurred.

So ordered.

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MARY MCKAY AND OTHERS, RESPONDENTS, v. ALLEN LASHER  
AND EDWARD G. C. LASHER, APPELLANTS.

*Evidence — only experts can express an opinion as to genuineness of a signature — 1880, chap. 86 — witness — impeachment of, by proof of contradictory statements.*

Upon the trial of this action the plaintiff, who sought to prove that the signature to a certain deed was not the signature of one James Clark, produced a note which was proved to have been signed and indorsed by Clark. A witness



who was not shown to be an expert, was directed to look at the signature and indorsement of the note, and was then asked and allowed, against the defendants' objection and exception, to answer "no" to the following question: "Assuming those to be the genuine signatures of James Clark, is that the signature of James Clark on the deed I show you?"

*Held*, that the evidence should have been excluded.

The alleged deed of James Clark had been proved, on June 13, 1885, by the subscribing witness, one Lawrence, before a notary public, and was given in evidence with such proof by the defendants. The plaintiff was allowed, against the defendants' objection and exception, to prove statements made by Lawrence that he did not have anything to do with this transaction of Clark's; that he did not know Clark at the time, and that he was willing to assist the plaintiff if she would pay his expenses.

*Held*, that even if it could be assumed that Lawrence was to be regarded as a witness produced by the defendants, he could not be impeached, by proof of these statements, until he had first been asked whether he had ever made them.

*It seems*, that this assumption could not be made.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury at the Ulster Circuit.

*M. Schoonmaker*, for the appellants.

*F. L. Westbrook*, for the respondent.

LEARNED, P. J.:

One of the questions involved was whether the signature to a certain deed was that of James Clark. As charged by the court, the plaintiffs were entitled to recover, if the jury should find that the signature was not that of Clark.

A note which was proved to have been signed and indorsed by Clark was produced. And a witness, who was not shown to be an expert, was directed to look at the signature and indorsement of the note. She was then asked by plaintiff's counsel: "Assuming those to be the genuine signatures of James Clark, is that the signature of James Clark on the deed I show you?" She answered "No."

A similar question was put by plaintiff's counsel to another witness, not an expert, and a similar answer given.

These questions were duly objected to by the defendant.

Chapter 36 of the Laws of 1880 was intended to modify the former rule. Previously to that act it had been competent for experts to compare the disputed writing with genuine specimens,

which had been lawfully given in evidence on the trial for other purposes. But it had not been competent to introduce genuine specimens merely for the purpose of comparison. The statute permits the introduction of genuine specimens merely for comparison, although they are not otherwise evidence in the case.

But the statute has not changed the law as to the persons whose opinions may be given. Opinions are to be given by experts, as well on the question of handwriting as on any other questions. Persons, other than experts, are to testify to facts, not opinions. If one, who was not an expert, were permitted to give his opinion as to genuineness of handwriting, based merely on the comparison, at the trial, of the disputed writing with one proved to be genuine, he would be usurping the duty of the jury. They, by that same statute, may compare these writings. The evidence given should have been excluded. (See *Peck v. Callaghan*, 95 N. Y., 73.)

This alleged deed of James Clark had been proved June 13, 1885, by the subscribing witness, Joseph C. Lawrence, before a notary public; and was given in evidence with such proof by the defendants.

The plaintiff gave in evidence, against defendants' objection, statements made by Lawrence to a witness, that he did not have anything to do with this transaction of Clark; that he did not know Clark at the time. And again, by another witness, statements that he did not know James Clark and had no transaction with him; that he was willing to assist Mrs. McKay, and would come up, if she would pay his expenses.

The object of this testimony was to throw discredit upon the proof of the deed made by Lawrence before a notary public. Now, the most favorable view for the plaintiff, in endeavoring to sustain the admissibility of this evidence, is to claim that Lawrence was practically a witness for the defendants, and hence that his testimony, viz., the proof before the notary, might be attacked in the usual manner, by showing that he had, at other times, made contradictory statements.

Assuming that this view of the position of Lawrence is correct, then we have the difficulty that, to impeach a witness in this manner, he must first be asked whether he had made the alleged contradictory statements. This is a most necessary and important

rule. A deviation from it is unjust, both to the witness and to the party calling him. Of course, no such question was put to Lawrence, for he was not on the stand.

Whether the assumption that Lawrence was practically a witness for defendants, and hence liable to impeachment by the plaintiff, is correct, we are not ready to say. It is not so decided in *Jackson ex dem. Gibbs v. Osborn* (2 Wend., 555), cited by plaintiff's counsel.

The statute allowing a deed to be acknowledged or proved out of court, and to be recorded, and allowing the record to be evidence may, of course, be abused, as plaintiff's counsel suggests. But, perhaps, it would be a very serious evil to treat every witness who had thus proved a deed out of court, as if he was a witness produced on the trial by the party offering the deed in evidence, and as subject to all the modes of impeachment to which such a witness in court is liable. Deeds long since recorded might, if such a course were permitted, be overthrown by testimony which the other party would be in no readiness to meet.

Some other questions were presented on the argument which we need not consider.

The judgment should be reversed, new trial granted, costs to abide event.

BOOKER and LANDON, JJ., concurred.

Judgment reversed, new trial granted, costs to abide event.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
HIRAM SINKLER, RESPONDENT, v. IRVING C. TERRY,  
SUPERINTENDENT OF THE ONONDAGA COUNTY PENITENTIARY AT  
SYRACUSE, NEW YORK, APPELLANT.

*Constitution — the legislature cannot provide for the election of a justice of the peace for a village — Constitution, art. 6, sec. 18 — there can be no de facto officer unless there be an actual existing office.*

The charter of the village of Canton, provides for the election of "one justice of the peace," by ballot, at the annual meeting held in said village for the election of officers, and confers upon him "the usual powers of justices of the peace of towns in relation to crimes and misdemeanors, and to oaths and acknowledg-

THIRD DEPARTMENT, NOVEMBER TERM, 1886.

ments, and also in civil actions in which all the parties shall be residents or inhabitants of said village."

*Held*, that the statute was unconstitutional, as it violated the provisions of section 18 of article 6 of the Constitution.

That the acts of a person claiming to hold the office of justice of the peace of said village, by virtue of an election at the annual meeting held for the election of village officers, would not be regarded as valid, as the acts of a *de facto* justice, for the reason that there was no such office as justice of the peace for the village of Canton, and that, in order that there may be an officer *de facto*, there must actually exist the office into which he can intrude.

*It seems*, that if the designation of the officer had been police justice instead of justice the act might have been sustained, under the provisions of section 19 of article 6 of the Constitution, providing that "inferior local courts of civil and criminal jurisdiction may be established by the legislature," upon the implied construction that his civil and criminal jurisdiction was limited to the village, and thus local and within the express power conferred by this section of the Constitution. (Per LANDON, J.)

APPEAL by the people of the State of New York from an order made by Justice Tappan July 12, 1886, and entered in St. Lawrence county, discharging the relator from imprisonment.

Henry E. Seaver, who claims to be a justice of the peace, convicted the relator, Hiram Sinkler, of the crime of assault in the third degree, and sentenced him to the Onondaga County Penitentiary for the term of four months. After the relator had been confined in the penitentiary for the period of three months, his mother, in his behalf, procured a writ of *habeas corpus*, requiring the superintendent of the penitentiary to produce the relator before Justice Tappan, on the 10th of July, 1886, that the cause of his detention might be inquired into.

It appeared that at the annual charter election in the village of Canton, on the 12th of January, 1886, Mr. Seaver received no votes for the office of "justice of the peace," but did receive 162 votes for "police justice." The clerk of the village filed with the county clerk a certificate of Mr. Seaver's election as "justice of the peace." Mr. Seaver gave a bond as justice of the peace, which bond was approved by the supervisor of the town of Canton.

The act which created the office of justice of the peace of the village of Canton is section 2 of chapter 70 of 1859, as amended by chapter 263 of 1870, which reads as follows: "The officers of said village shall be five trustees, one of whom shall be designated

and elected president; \* \* \* one justice of the peace, with powers hereinafter mentioned. \* \* \* The trustees, assessors, justice of the peace, treasurer, clerk, collector and constable shall be elected by ballot at the annual meeting in said village for the election of officers, and shall hold their respective offices until the next annual meeting and until their successors are elected and duly qualified. \* \* \* The said justice of the peace shall have the usual powers of justices of the peace of towns, in relation to crimes and misdemeanors, and to oaths and acknowledgments, and also in civil actions, in which all the parties shall be residents or inhabitants of said village."

*John C. Keeler*, for the relator.

*Ledyard P. Hale*, for the appellant.

LANDON, J. :

If there is such an office as justice of the peace for the village of Canton, then Mr. Seaver, notwithstanding the fact that his election was attended with such irregularities as would probably be fatal to his title, if the people should, by an action in the nature of a *quo warranto*, require him to defend it, had, under some color of legal title, assumed the office and discharged its duties, and was, therefore, a justice of the peace *de facto*, and his official acts would, upon grounds of public policy, be regarded as valid, so far as the rights of third persons are concerned. (*Wilcox v. Smith*, 5 Wend., 231; *People v. White*, 24 id., 520; *Re Wakker*, 3 Barb., 162; *People v. Cook*, 8 N. Y., 67; *People ex rel. Bush v. Thornton*, 25 Hun, 456; *Morrison v. Sayre*, 40 id., 465.)

But in order that there may be an officer *de facto*, there must actually exist the office into which he can intrude. The unauthorized person must occupy an actually existing seat of authority, otherwise he would, by his assumption, create an additional office and exercise its functions.

The village of Canton, it was conceded upon the argument, formed part of the town of Canton. We may presume that the town of Canton has all the justices of the peace to which it is entitled. Section 18 of article 6 of the Constitution provides that "The electors of the several towns shall, at their annual town meet-

ing, and in such manner as the legislature may direct, elect justices of the peace, whose term of office shall be four years." Mr. Seaver, in order to have any color of claim to the office of justice of the peace for the town of Canton, must have sought to enter into it when the entrance was open. But no such claim is made in his behalf. He claims an election by the electors of the village of Canton.

The charter of the village (Laws 1859, chap. 70, § 2, amended by Laws 1870, chap. 263, § 2) authorizes the election of one justice of the peace for said village. The section of the Constitution cited also provides "that justices of the peace and district court justices shall be elected in the different cities of this State in such manner, and with such powers, and for such terms, respectively, as may be provided by law."

It has been repeatedly held that justices of the peace cannot be elected otherwise than as prescribed by the Constitution. (*Geraty v. Reid*, 78 N. Y., 64; *People ex rel. Smith v. Schiellein*, 95 id., 124; *Wenzler v. The People*, 58 id., 516.) The constitutional provision for the election of justices of the peace in towns and cities, is the denial of the power to elect them in villages. The statute authorizing the election of a justice of the peace for the village of Canton is, therefore, unconstitutional, and Mr. Seaver could not be a *de facto* justice of the peace for the village since there is no such office.

But section 19 of article 6 of the Constitution, provides, that "inferior local courts of civil and criminal jurisdiction may be established by the legislature." This provision took effect in 1870. It had been previously decided that the legislature had the power to establish the office of police justice in villages, provided such officer was given a strictly local jurisdiction, and not the general territorial jurisdiction which justices of the peace possess. (*Sill v. Village of Corning*, 15 N. Y., 297; *Brandon v. Avery*, 22 id., 469.) But it had also been decided that if such police justice in villages is vested with the same powers and territorial jurisdiction as a justice of the peace, then he is a justice of the peace under another name, and the statute creating the office is unconstitutional. (*Waters v. Langdon*, 40 Barb., 408.) The distinction thus indicated affords the test of constitutionality. (*Village of Deposit v.*

*Vail*, 5 Hun, 310; *Bocock v. Cochran*, 32 id., 521; *Conor v. Hilton*, 66 How., 146; *Geraty v. Reid*, *supra*.)

The charter of the village defines the power of the justice of the peace as follows: "The said justice of the peace shall have the usual powers of justices of the peace of towns, in relation to crimes and misdemeanors, and to oaths and acknowledgments, and also in civil actions, in which all the parties shall be residents or inhabitants of said village." (Sec. 2.)

If the designation of the officer had been police justice, instead of justice of the peace, the act might have been sustained, within the authorities cited, upon the implied construction that his civil and criminal jurisdiction was limited to the village, and thus local and within the express power conferred by the Constitution. But a justice of the peace is an officer of the Constitution. Whether it is competent for the legislature to pass a local law depriving him, elsewhere than in cities, of any of the powers and jurisdiction conferred by general laws, we need not inquire. (Const., art. 3, § 18.) Certain it is that if by so doing he may be elected in villages, then the Constitution is thwarted by an easy evasion — an evasion pointedly condemned in *Wenzler v. People* (58 N. Y., 516). This officer is designated a justice of the peace, whether with greater or less statutory powers, and we cannot suppose that any other than a constitutional justice of the peace can exist. The relator was properly discharged.

Order affirmed, with fifty dollars costs and printing disbursements. (Code Civil Pro., § 3240.) The appeal was taken in the name of the people, under section 2059 Code Civil Procedure, and the costs should be paid by the county of St. Lawrence.

LEARNED, P. J., and BOOKES, J., concurred.

Order affirmed, with fifty dollars costs and disbursements.

HENRY C. ADAMS, APPELLANT, v. ALGERNON S. SULLIVAN, PUBLIC ADMINISTRATOR, ETC., OF HENRY ADAMS, DECEASED, AND OLIVER M. ARKENBURGH, GUARDIAN, ETC., AND OTHERS, RESPONDENTS.

*Extra allowance — when it cannot be granted — effect of a notice attached to a summons that judgment will be taken for an amount named.*

Upon the trial of this action, brought to obtain an accounting of the affairs of an alleged partnership, the court found that no partnership existed and directed that a judgment be entered in favor of the defendants, to whom it awarded costs and an extra allowance of \$2,000.

*Held*, that although ordinarily such an allowance is made in an order, and a party aggrieved thereby must review the order by an appeal therefrom, yet as the justice had included the allowance, divided among the several defendants, in his conclusions of law upon which the judgment was entered, the propriety of granting the same might be considered on the appeal from the judgment.

That as the amount of the extra allowance is to be computed upon the sum recovered or claimed, or the value of the subject-matter, and as it was decided that the plaintiff was not entitled to recover anything, and as neither the summons nor complaint stated any amount which was sought to be recovered, no extra allowance could be granted.

That the fact that a notice attached to the summons stated that in case of a default the plaintiff would take judgment for \$65,000 was of no effect whatever, and did not show any amount claimed, as the case was one in which judgment could only be taken on application to the court.

APPEAL from a judgment dismissing the complaint, entered in Montgomery county, upon the trial of this action by the court without a jury.

*H. C. Adams*, for the appellant in person.

*Robert F. Little*, for the respondents Sullivan and Arkenburgh.

*L. C. Whiton*, guardian *ad litem*, for the infant respondent.

*Fred. M. Littlefield*, for the respondent Maria F. Babcock.

LEARNED, P. J. :

This action is brought for an accounting of an alleged partnership. The complaint, besides alleging the partnership, alleges that Henry Adams, deceased, the alleged partner, under an agreement



so to do, invested partnership funds in certain specified investments of real and personal estate; to the proper share of which, and of the income therefrom, plaintiff alleges that he is entitled. The complaint further alleges a certain trust of real and personal property made by Henry Adams, deceased, and certain litigations in respect thereto.

It is not made clear how these allegations are pertinent to the subject-matter of the controversy.

The issue joined in this complaint, and the answer, came on to be heard at Special Term, a jury being waived.

A motion for a reference had previously been made and denied, apparently on the ground that the existence of a partnership had been put in issue, and that that matter should be determined before an accounting should be had, if had at all.

The learned justice who heard the case held that no partnership had been shown to have existed; and that no agreement to invest funds as alleged in the complaint had ever been made by Henry C. Adams, deceased.

We have examined the evidence, and we think these findings are well sustained.

There can be no question that the proof entirely failed to establish a partnership or the alleged agreement to invest.

This conclusion of the learned court entitled the defendants to judgment in their favor.

And in his discretion, to costs, he awarded costs to the several defendants. This was proper.

He also awarded an extra allowance of \$2,000.

Ordinarily, such an allowance is made in an order, and then if a party desires to appeal, he appeals from the order.

Here the learned justice has included the allowance (divided among the several defendants) in his conclusions of law, on which the judgment has been entered.

It may, therefore, not be improper to consider the allowance in this appeal from the judgment. No other mode seems open to the plaintiff.

The plaintiff claims that no costs could be awarded on these preliminary issues. We do not think that this is correct. If the court had found that a partnership had existed, then he would have

ordered a reference for an accounting, and in that case no final judgment could have been entered until the accounting had been completed. But now the court finds that there was no partnership. That is an end of the action. Nothing remains except to appeal from the judgment. It was therefore proper for the court to award, in his discretion, costs and an extra allowance.

The extra allowance is to be computed upon the sum recovered or claimed or the value of the subject-matter involved. (Sec. 3253.)

Plaintiffs summons had a notice attached that in default he would take judgment for \$65,000. (Section 419.) This action is not one specified in section 420. Judgment could only be taken by application to the court. (Section 1214.) It does not appear that in such a case the notice is of any use — and the notice, therefore, does not show an amount claimed, nor does the complaint, which asks for a discovery and accounting. There was no sum recovered.

Then the question is, what is the value of the subject matter involved. No affidavits are made which establish this amount. One which was used states that the action was brought to recover \$65,000. But that is only taken from the notice above mentioned.

There are allegations in the complaint that the annual profits of the partnership amounted to \$5,000. But this is shown to be untrue by the finding that there was no partnership. So are all the allegations as to investments and their value. No such investments exist, as the court has found.

In *Weaver v. Ely* (83 N. Y., 89), legatees brought an action for an accounting and for payment of the amount due from personal property, or, if insufficient, from real estate. It was claimed that the amount involved was upwards of \$60,000, and extra allowance had been given. But it proved that the testator's estate was insolvent, so that plaintiffs could get nothing. And the court held that the subject-matter involved was nothing. That case was very similar to the present; and the court say that the claim was for an accounting, and that plaintiff should be paid what should be found due on the accounting. The plaintiffs in that case were entitled lawfully to their legacies and to an accounting. Here the plaintiff is entitled not even to an accounting. The amount involved, said the court, could only be the plaintiff's interest, when ascertained, not the nominal amount of their legacies. So, here, the amount

involved is not the alleged property which Henry Adams may have had, but plaintiff's interest therein, and he had none. See *Struthers v. Pearce* (51 N. Y., 365) at the close of the opinion; *Budd v. Smales* (N. Y. Daily Reg., March 19, 1884, cited 8 Civil Pro., 230), which is very similar to the present case. Of course there are cases where the plaintiff claims some specific thing or right and is unsuccessful. Then the value of that thing or right is the subject-matter, although there be no recovery. But here the plaintiff asked an accounting and payment of what might appear to be owing to him. No proof is given of the value of any matters as to which he asked an accounting, even if such proof would have been material under the case last cited.

We are, therefore, of opinion that the allowance of \$600 to Maria F. Babcock, of \$1,150 to Oliver M. Arkenburgh, and of \$250 to Louis O. Whiton, should be stricken out of the judgment, and that otherwise the judgment should be affirmed, without costs of appeal.

BOCKES and LANDON, JJ., concurred.

Extra allowance stricken out, and as thus modified judgment affirmed, without costs to either party except the public administrator.

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GEORGE HINKLEY, APPELLANT, v. THE TROY AND  
ALBIA HORSE RAILROAD COMPANY, RESPONDENT.

*Appeal to the County Court from a justice's judgment—the right to a new trial is determined by the amount demanded in the amended, and not by that asked for in the original pleadings—Code of Civil Procedure, § 8068—what counter-claim cannot be pleaded in an action of tort—when an amount exceeding fifty dollars claimed thereby will not justify a new trial on appeal.*

Upon the appearance of the parties to this action before a justice upon the return of the summons, the plaintiff complained for a wrongful injury done to his horse by the defendant's horse, and demanded judgment for \$200. The defendant having answered by a general denial the case was adjourned to a future day, on which the plaintiff amended his complaint and claimed to recover as damages forty-nine dollars and costs. The defendant interposed an amended answer containing a counter-claim alleging that at the time and place mentioned in the complaint defendant, through the carelessness, recklessness and negligence of plaintiff in driving his, a vicious and unruly, horse ran into and collided with a horse

belonging to the defendant, and that the defendant sustained damage in the sum of sixty dollars, for which sum he demanded judgment. The plaintiff having recovered a judgment for forty-nine dollars, with costs, the defendant appealed to the County Court, and in the notice of appeal demanded a new trial.

*Held*, that the County Court erred in denying a motion made by the plaintiff to have the case put on the law calendar for hearing as an appeal on the law.

That as the cause of action stated in the complaint admitted of no counter-claim in tort, unless it were alleged to grow out of or was connected with the transaction set forth in the complaint as the foundation of the plaintiff's claim, which was not alleged in the answer, that the right to a new trial was to be determined by the amount demanded in the complaint, and not by the amount of the alleged counter-claim set up in the answer.

That the question was to be decided by the amount demanded in the amended complaint, and not by that demanded by the first complaint.

That even if the counter-claim were admissible it should be held to be either sham, because no evidence was offered to support it, or to be an answer upon which the defendant had voluntarily suffered default. (LONDON, J.)

APPEAL from an order of the County Court of Rensselaer county denying a motion made by the plaintiff to have this case put on the law calendar as an appeal upon questions of law.

*B. C. Strait*, for the appellant.

*Benj. E. De Groot*, for the respondent.

BOOKES, J.:

This is an appeal from an order of the County Court, denying a motion made by the plaintiff to have the case, pending in that court on appeal from a Justices' Court, put on the law calendar for hearing as an appeal on the law. The plaintiff is justified in his practice by the decision in *Harvey v. Van Dyke* (66 How., 396.)

The papers before the court on this appeal show the following facts, with some others unimportant to be noted: That on the return of the summons the parties appeared before the justice, when the plaintiff complained for a wrongful injury to his horse by the defendant's horse, and demanded judgment for \$200. The defendant answered by general denial, thereupon an adjournment was had to a future day. On the adjourned day the plaintiff amended his complaint by some amplification of it, and claimed to recover, as damages, forty-nine dollars and costs. The defendant then interposed an amended answer, admitting its incorporation and, as

before, putting in a general denial as to all other matters charged in the complaint, and adding a counter-claim, as follows: Defendant further alleges and states, for a cause of action and claim herein, that at the time and place mentioned in the complaint herein, defendant, through the carelessness, recklessness and negligence of plaintiff, in driving his, a vicious and unruly, horse run into and collided with a horse belonging to the defendant, and that defendant thereby sustained damage in the sum of sixty dollars, for which sum it demands judgment.

The parties went to trial, on their pleadings, and the plaintiff recovered forty-nine dollars, with costs of suit. The defendant appealed to the County Court, and, in the notice of appeal, demanded a new trial in the appellate court. Thereupon, the return of the justice having been made, containing the proceedings and evidence before him, the plaintiff made a motion in the County Court to have the case put on the law calendar of that court, for hearing upon the law, on the ground that the case was not one entitling the defendant to a new trial in the appellate court, as demanded in the notice of appeal, which motion was denied.

In this ruling we are of the opinion that the County Court was in error. The right of an appellant to a new trial in the appellate court, on an appeal from justice's judgment, is made to depend on section 3068 of the Code of Civil Procedure, which provides that where an issue is joined before a justice, "and the sum for which judgment was demanded by either party in his pleading exceeds fifty dollars," the appellant may have a new trial in the appellate court, by so demanding in his notice of appeal. Now, in this case the plaintiff demanded judgment, in and by his complaint on which the trial was had, for but forty-nine dollars, as damages, and the defendant's counter-claim, on which it demanded judgment, in its favor, for sixty dollars, was inadmissible as a counter-claim in the action. The alleged right of action stated in the plaintiff's complaint was in tort, as was also the defendant's alleged counter-claim. The complaint admitted of no counter-claim, especially not a counter-claim in tort; certainly not unless the alleged counter-claim arose out of, or was connected with, the transaction set forth in the complaint as the foundation of the plaintiff's claim. (Code Civil Pro., §§ 2945, 501, 502.) But the defendant's counter-claim

was not so pleaded. The fact was not so, as stated, *non constat*, but that the alleged counter-claim grew out of another and distinct transaction from that counted on in the complaint. Indeed, it is so pleaded, and might be sustained by proof of an entirely different occurrence. To make it admissible in any possible view of the subject, as a counter-claim in this action, the fact should have been averred that it grew out of, or was connected with, the transaction set forth in the complaint as the foundation of the plaintiff's claim. The counter-claim then being inadmissible as a pleading in the case, could not be made the basis of a demand for a new trial in the appellate court. (*Harvey v. Van Dyke*, 66 How., 396, and cases there cited.)

The point is taken, however, that the plaintiff, in and by his original complaint, demanded judgment for \$200, and that thereby the defendant's right to demand and have a new trial in the appellate court became fixed and was secured to it, notwithstanding the amendment of the pleading thereafter made. This is put on the ground that the "issue of fact" referred to in section 3068, above cited, means and is limited to that made on the original joining of issue before the justice, to the exclusion of what may be stated and demanded in amendment of the pleadings thereafter made. This is manifestly a mistaken view of the subject. The issue joined before the justice there spoken of is the issue made before the justice for trial, and on which the trial proceeds. An amended pleading supersedes the original, takes its place, is a substitute for the original, which is no longer treated as a pleading in the action. (2 Wait's Pr., 505, and cases there cited.) It would be strange, indeed, if a superseded pleading — a pleading expunged from the record — could be allowed to influence and control a future proceeding in the action. Section 3068 defines and limits the cases in which a new trial may be had in the appellate court, and the limitation is there made to cases where an issue was joined before the justice, on pleadings wherein judgment was demanded by either party exceeding fifty dollars, in *contra-distinction* to cases where no issue had been there joined.

Now here, after the amendment was allowed and made, and on excluding the defendant's inadmissible counter-claim, there was no demand by either party for a recovery exceeding fifty dollars as

damages. The appellant was not, therefore, entitled to a new trial in the appellate court. It follows that the plaintiff's motion to have the case put on the law calendar should have been granted.

The charge of fraud and bad faith made by the parties, each against the other, in framing their respective pleadings, has no significance on the motion. What was done by them in that respect they had the legal right to do, and fraud and bad faith cannot be well asserted for doing that which the law permits to be done.

The order appealed from must be reversed and the motion below granted, with ten dollars costs of appeal and disbursements for printing, but without costs of motion.

LONDON, J.:

I concur. If by a liberal construction it could be held that the alleged counter-claim was admissible, because stating a cause of action arising out of the transaction set forth in the complaint, it then should be held to be either sham, because no evidence was offered to support it, or to be an answer upon which the defendant, as appears from the like reason, voluntarily suffered default, and he should not be accorded a "new" trial upon it unless he has had a trial in the first instance, in the form appointed for the purpose. But I entirely concur upon the grounds assigned by my brother BOCKES.

LEARNED, P. J. (dissenting):

I am still of the opinion which I expressed in *Harvey v. Van Dyke* (66 How. 396), that this appeal does not lie. An appeal to this court from an order of the County Court can only be taken in a matter affecting a substantial right.

The order appealed from denies a motion to transfer the case from the trial calendar to the law calendar. I think the County Court has control of its calendars, whether they be called law calendars or trial calendars.

When the case shall come on to be heard before the County Court, if the court shall hear new evidence, and conduct a new trial, when it ought to decide on the justice's return only; or, if it shall refuse to hear new evidence and to have a new trial, and insist on hearing the case on the justice's return, when it ought to do the contrary, then there will be error which we can review.

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THIRD DEPARTMENT, NOVEMBER TERM, 1886.

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But putting a cause on one calender or another is only an intimation of what the County Court thinks the rights of the parties will be when the case shall come on to be heard.

I think we should not undertake to regulate the calendars of other courts, and, indeed, that we have no jurisdiction of such matters.

Therefore, I think the appeal should be dismissed.

Order reversed, with ten dollars costs and printing disbursements, and motion below granted, without costs.

LEARNED, P. J., voting for dismissal.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-  
ENT, v. GEORGE CLEMENTS, APPELLANT.

*Overdrawing of his account, by a bank officer — what must be shown to justify his conviction under section 600 of the Penal Code.*

To authorize the conviction of an officer of a bank indicted for knowingly overdrawing his account and thereby obtaining \$690 in money in violation of the provisions of section 600 of the Penal Code, which declares that "an officer, agent, teller or clerk of any bank, \* \* \* who knowingly overdraws his account with such bank, and thereby wrongfully obtains the money, notes or funds of such bank, is guilty of a misdemeanor," the fact that he did by means of the check, by which his account is alleged to have been overdrawn, wrongfully obtain the money, must be proved by the prosecution.

Proof of the possession by the bank of his check at a time when his account is overdrawn, although sufficient to presumptively show a credit in favor of the bank, on an accounting between the bank and the defendant, will not justify his conviction in a criminal action.

The transaction must be shown by which the defendant delivered the check to the bank and obtained the money therefor.

The mere fact that an officer of the bank has knowingly overdrawn his account, will not justify his conviction, unless it be shown that the money thereby obtained was "wrongfully obtained," as the word "wrongful" in the statute implies more than the mere want of funds in the bank.

APPEAL from a judgment of the Court of Oyer and Terminer of Washington county, convicting the defendant of a misdemeanor.

*Hughes & Northup*, for the appellant.

*Edgar Hull*, district attorney, for the People.



LEARNED, P. J. :

The defendant was indicted under section 600 of the Penal Code, which declares that an officer of any bank who knowingly overdraws his account with such bank, and thereby wrongfully obtains the money, notes or funds of such bank, is guilty of a misdemeanor. The defendant was cashier of the State Bank of Fort Edward from April, 1871, to the time when the bank closed its business, September 9, 1884. An action was commenced about that time by the People against the bank, and a receiver was appointed. His appointment seems to have been made September twentieth, and he took possession September twenty-second.

About the first of October, Mr. Ostrander, a bookkeeper, was employed by the receiver in the business of settling the affairs of the bank. By direction of the receiver he wrote up the accounts in the books of the bank as of the date of September ninth. The account of the defendant, as thus written up, shows no entries from August seventh to September eighth. Under date of September eighth there is a credit of \$1,125. Under date of September ninth a debit of \$153.50, another of \$690, and another of eighty-five dollars and thirty-seven cents; under date of September eighth a debit of forty-eight dollars and eighteen cents; under date of September ninth a credit of \$500, also of salary to date, \$287.49, and a debit of \$550.

The book, as thus written up, showed a balance against defendant of \$2,583.96, which has been paid. There is evidence from which it might be found that the defendant agreed to that balance against him. A judgment was recovered against him therefor by the receiver, December 20, 1884. There were vouchers, used in looking over the account, which at some subsequent time were delivered to defendant, and it was thought by a witness that among them was a check for \$690; but he had no personal knowledge on the subject.

On the trial, at the request of the prosecution, the defendant's counsel produced a check, dated July 25, 1884, on the said bank, payable to self or bearer, for \$690, signed by defendant. And it might perhaps be inferred by the jury that this check was the voucher for the item of \$690 debited to defendant, under date of September ninth, although there was no evidence on this point except the identity of the amounts.

An examination of the books of the bank by an accountant shows that on the books, as of the date of September eighth, after crediting defendant's salary that day, \$1,125, the defendant's account was overdrawn \$1,894.40; also that on the books, as of date of July 25, the defendant's account was overdrawn more than \$2,800, and that it had been overdrawn for a long time prior thereto and during the interval between those dates.

Now, the first count of the indictment, to which the court limited the people, is for defendant's knowingly overdrawing his account on the 9th day of September, 1884, and thereby *obtaining* \$690 in money. The court held that the precise time named in the indictment was not material, if it was not so distant from the true time as to mislead the defendant, and that within the range between July twenty-five, the date of the check, and September nine, the date laid in the indictment, it was not material what time was laid. The facts above stated constitute in substance the proof given at the trial, which is material for us to consider.

We may assume then (but only for the purpose of examining an important question), that from and before July 25, 1884, to September ninth of the same year, defendant's account was overdrawn; that during that time there was no charge against his account of the check of \$690; that he knew the condition of his account; that on the ninth of September this check of \$690, dated July twenty-five, was charged to him on his account by direction of the receiver; that judgment was recovered against him for the balance; that such balance was paid, and this check, among other vouchers, was returned to him.

Now, taking this statement (which is the strongest view of the case for the prosecution), and assuming that this evidence would justify a finding that the defendant, by the check of \$690, overdrew his account, there is no evidence that he thereby wrongfully obtained money, notes or funds of the bank.

The crime consists principally in such wrongful obtaining of money, as charged in the indictment. And the prosecution must show that the defendant did, by means of that check, wrongfully obtain money. If by that check he obtained money, that is, if, by presenting that check, he was paid money, or himself took money from the bank, that is a fact capable of proof.

The teller, for there was such an officer, could show the payment. Or if the defendant himself took the money, then the reduced amount of the cash on the day when it was taken could be shown. It is true that the mere possession of the check by the bank (assuming it to have been in the bank's possession) would presumptively show a credit in favor of the bank, on an accounting between the bank and the defendant. But when we come to proving a criminal charge against the defendant, something more is needed. The transaction must be shown by which the defendant delivered the check to the bank and obtained therefor money. Suppose, for instance, that on the twenty-fifth of July the defendant had been indebted to the bank for any cause, and being so indebted, had given this check as a voucher, then the check would not show that he had obtained money thereby from the bank.

A check is a direction to the bank to pay so much money and to charge the drawer therewith. As between the bank and the drawer the possession of the check is *prima facie* evidence that the bank has paid the money to some one. But when the people charge the criminal offense of obtaining money from the bank, they must show that the accused obtained the money; not, of course, with his own hands, but to his own benefit. And they must show that such obtaining was by means of a check which overdrew his account. To illustrate: If one who has no money or credit at a bank draws a check thereon, and obtains money therefor from some third person, he may be guilty of a crime. (Penal Code, § 569.) But the mere possession of the check by such third person would be no evidence of the crime. Proof would have to be given of the obtaining of the money from such third person by such check.

The people insist that the fact (assuming now that it was proved), that the bank once had possession of the check is presumptive evidence on this trial that the defendant, by means thereof, obtained money from the bank, and that it was for the defendant to disprove this. But we think otherwise. Between the bank and the defendant this was *prima facie* evidence of an indebtedness. But in this criminal action this did not show that by means of the check the defendant obtained money from the bank.

There is still another word in the statute which we have not considered, and that is "wrongfully." The offense is the "wrongfully

obtaining" money. There is a meaning in this word, otherwise it would not have been inserted. If we should exclude that word and read the statute, that every officer who knowingly overdraws his account, and thereby obtains the money of the bank, is guilty, we should be giving a construction which we do not think was ever intended.

Banks are established to lend money, and it is not illegal to lend money to officers (under certain limitations). Money loaned on an individual note is no better secured than money advanced on a check. Each is a loan, evidenced by the written obligation of the borrower. To say then that if a bank officer, of undoubted wealth and responsibility, should, knowingly, overdraw his account, and obtain thereby a few dollars, he would be guilty of a crime under this statute, seems to us incorrect.

It is not the mere obtaining, but the *wrongful* obtaining, which is aimed at. And "wrongful" implies more than the mere want of funds in the bank, because such want of funds is previously expressed in the statute by the word "overdraws." What shall in each case make the obtaining of money wrongful we need not say. The points we have thus discussed were presented on behalf of the defendant upon the trial in several ways by exceptions and by requests. We have thought it better to speak of the principles which should govern the case, rather than to comment on the exceptions.

The views we have stated clearly indicate where we think there was error to the defendant's prejudice. There are other points which we have not discussed, but which we do not say were not well taken.

Judgment and conviction reversed, new trial granted.

BOCKES and LANDON, JJ., concurred.

Judgment and conviction reversed, new trial granted.

CHARLES M. PRESTON, AS RECEIVER, ETC., OF JAMES D. MCINTYRE, APPELLANT, v. THOMAS L. SOUTHWICK, GEORGE WELLS AND JAMES D. MCINTYRE, RESPONDENTS.

*Filing of a chattel mortgage — 1888, chap. 279 — a subsequent agreement affecting it need not be filed — its validity is not affected by the fact that part of the agreement rests in parol.*

This action was brought by the plaintiff, who had been appointed January 15, 1884, a receiver of the property of the defendant McIntyre, in proceedings supplementary to execution, to recover the value of property of the said McIntyre, alleged to have been wrongfully and in fraud of the rights of his creditors taken by the defendants Southwick and Wells, under two bills of sale given to them respectively by McIntyre on December 29, 1883, and filed in the county clerk's office on December thirty-first (the thirtieth being Sunday). The referee found that the said bills were given by the said McIntyre at a time when he was insolvent, for money theretofore loaned to him by the defendant Southwick, and for notes indorsed for his accommodation by Wells; that, after the execution and delivery of the said bills of sale, the defendants Southwick and McIntyre signed a written agreement by which McIntyre agreed to pay over to Southwick all moneys realized upon articles sold and described in said bills of sale, to be by him applied in payment of the sums mentioned therein, and to act as the agent of Southwick and Wells in making such sales. The agreement then authorized McIntyre, "on the part of said Southwick and Wells," to sell the said articles as their agent, and not otherwise, and on condition that he pay over the proceeds as above. This agreement was not filed.

*Held*, that the fact that the second agreement was not filed did not render the bills of sale void as against the creditors of McIntyre as being a failure to comply with the provisions of section 1 of chapter 279 of 1883, providing that every mortgage or conveyance intended to operate as a mortgage which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession, shall be absolutely void as against the creditors of the mortgagor, "unless the mortgage, or a true copy thereof, shall be filed." (LONDON, J., dissenting.)

APPEAL from a judgment for \$256.94 costs, entered in Ulster county on the report of a referee dismissing the plaintiff's complaint.

The action was brought by the plaintiff as a receiver, appointed in proceedings supplementary to execution, to recover the value of certain property of the defendant James D. McIntyre, an insolvent, alleged to have been taken by the defendants Thomas L. Southwick and George Wells, wrongfully and in fraud of the rights of creditors, under two bills of sale, and a written agreement set forth in the com

plaint. The plaintiff was appointed receiver on the 15th day of January, 1884.

The referee found that for a considerable time prior to December 29, 1883, James D. McIntyre was engaged in business in the city of Kingston, N. Y.; that the defendant Wells had for some three years prior to December 29, 1883, been an accommodation indorser for McIntyre, and on December 29, 1883, was an accommodation indorser of notes made by McIntyre to the amount of about \$925, which notes had been discounted by the State of New York National Bank and were then held by said bank, said McIntyre having received the proceeds of said notes, which notes on said December twenty-ninth were not due. That said McIntyre had promised the defendant Southwick, in procuring loans from him, in substance, that if any business misfortunes should befall him, he would protect him and see that he was paid, and repeated the same statement to him when giving him a note for \$885, and on such assurance payment of the amount for which said note was given was not pressed; that said McIntyre had from time to time continued to procure Wells to indorse his notes on the promise to him that he would certainly pay the notes and not allow him to lose by his indorsement; that on the 29th of December, 1883, McIntyre was insolvent and unable to pay his debts, and had been for a considerable time before Burdon & Stowe had commenced an action against James D. McIntyre for the collection of a debt due to them in the Supreme Court, prior to December 29, 1883, and on the 3d day of January, 1884, obtained judgment for \$244.97, on which an execution was duly issued, returned unsatisfied, and thereafter, in proceedings supplementary to execution, the plaintiff was appointed receiver of said James D. McIntyre's estate by an order made January 15, 1884, and was, by an order of this court, authorized to bring this action; that the plaintiff has duly qualified as such receiver; that said McIntyre, on the 29th day of December, 1883, made, executed and delivered to the defendant, George Wells, a bill of sale of a part of said McIntyre's stock of trade in his said store, for the consideration of \$925, named in said bill of sale; that the real consideration of said bill of sale was that said Wells was to pay notes upon which he was accommodation indorser, and which he did subsequently pay; that on said 29th day of December, 1883, said McIntyre made, executed and delivered to the defendant,

Thomas L. Southwick, a bill of sale of a part of his stock of goods in said store, on payment and satisfaction of \$885 then owing by said McIntyre to said Southwick, the whole amount of which was then due, with interest thereon from August 3, 1883; that said McIntyre represented to said Southwick & Wells that the said bills of sale covered his entire stock of goods and accounts due him, and they were accepted in that belief; that the articles enumerated in said bill of sale in fact did not cover his entire stock of goods, and some of them were left out of the enumeration by said McIntyre by reason of his not taking an inventory. Most of the valuable stock in his store being stoves piled up in the cellar, the names of them were not correctly enumerated, and some were known as well by one name as another, but that said McIntyre did actually deliver over to said Southwick and Wells his entire stock of goods under said bills of sale; that said bills of sale were filed in the Ulster county clerk's office, in the city of Kingston, on the 31st day of December, 1883, said McIntyre, Southwick and Wells all residing in said city; that immediately after the execution and delivery of said bills of sale, the defendant Southwick, for himself and said Wells, and by his authority, took possession of the stock of goods in the store, and thereafter continued in the possession thereof until sold, and on the said 29th day of December, 1883, entered into the following agreement:

"It is hereby agreed by me, James D. McIntyre, that I will pay over to Thomas L. Southwick all moneys realized upon articles sold described in the bills of sale made by me to said Southwick and to George Wells, both dated Dec. 29, to be by said Southwick applied in payment of the sums mentioned in said bills of sale due said Southwick & Wells, and I agree to act as their agent in making said sales, and not otherwise. The entire proceeds of such sales to be applied to the reduction of said indebtedness. On the part of said Southwick & Wells, we authorize said McIntyre to sell the articles described in the two bills of sale as our agent only, and not otherwise, and on condition that he pay over the proceeds as above, and apply them to the indebtedness to us.

Dated Dec. 29, 1884.

JAMES D. MCINTYRE.  
THOMAS L. SOUTHWICK."

*G. R. Adams*, for the appellant.

*J. Newton Fiero*, for the respondents, Southwick & Wells.

LEARNED, P. J. :

The bills of sale from McIntyre to Southwick and to Wells were executed and delivered December 29, 1883. They were filed December 31, 1883, in the proper office. The intervening day, December thirtieth, was Sunday.

If there was an oral agreement that these bills of sale should be, in fact, mortgages, such oral agreement could not be filed. All that could be done under the statute (chapter 279, Laws of 1833, sec. 1) was to file the bills of sale. And that was done promptly. The statute speaks of a "conveyance intended to operate as a mortgage" and requires its filing. And of course nothing more can be done, where the agreement rests in parol, by which a bill of sale, absolute on its face, is in fact a mortgage. The character of the bills of sale, that is, whether they were absolute or intended as mortgages, must rest upon the agreement existing at the time when they were delivered. It was subsequent to such delivery and (according to the testimony of Southwick) subsequent to the filing of the bills of sale in the county clerk's office that Southwick executed to McIntyre the authority to sell the goods. This was not signed by Wells.

Now, if the oral agreement, on which the bills of sale were delivered, made them in fact mortgages, then this authority, signed by Southwick, was no part of the chattel mortgages, and it was not necessary to file it. If the bills of sale were chattel mortgages when they were executed, then they were properly filed, for the written authority signed by Southwick was not in existence when the bills of sale were delivered.

But that written authority was not material to the contract between Southwick and Wells on the one side and McIntyre on the other, in respect to the transfer of his property to them. It might be useful as evidence tending to show what the actual oral contract was; but it was not a part of the contract. It was only an authority from one of the two separate mortgagees (perhaps acting for both) to McIntyre to dispose of their property, and to pay the avails to Southwick, the mortgagee; such avails to be applied to the debts for which the bills of sale had previously been given as security. It did not



make chattel mortgages out of the bills of sale; but it only acknowledged the duty of the mortgagees which already rested upon them by the oral agreement. It refers to the sums mentioned in the bills of sale due said Southwick and Wells. And the bills of sale had expressed these amounts as the consideration. Suppose this paper had been executed to some third party (as it might have been), who was to sell these goods for Southwick and Wells? Would there have been any necessity for filing it?

The case of *Ely v. Carnley* (19 N. Y., 496), holds only that, where a copy of a chattel mortgage is filed, after the lapse of the first year (under sec. 3 of the Act), and the statement of the amount claimed was too much by \$100, such filing was not good. But that does not hold that where a bill of sale, absolute on its face, is, by oral agreement, a chattel mortgage; such bill of sale cannot be filed. Yet such bill of sale does not show the amount of the lien.

I find no case which requires the filing of such an instrument as the power executed by Southwick to McIntyre; and I do not think that the bills of sale (assuming for the present that they were chattel mortgages) were void because this paper was not filed. That where a bill of sale is, by oral agreement, intended as a mortgage, it is a full compliance with the statute to file the bill of sale, seems to me evident. The statute says: "A conveyance intended to operate as a mortgage." Now, if the instrument is on its face a mortgage, then this language is inappropriate. The language must be intended for the case where the instrument is absolute on its face, but "intended to operate as a mortgage" by oral agreement. It seems to me that the mortgages (assuming them to be such) were properly filed under the statute.

I think the judgment should be affirmed, with costs.

BOOKES, J., concurred.

LONDON, J. (dissenting):

The testimony of all the parties to the bills of sale establishes, beyond any reasonable question, that one was given to secure to Southwick the payment of McIntyre's debt to him, and the other to secure Wells against loss upon his liability as indorser for McIntyre. This testimony is cited in the brief of the counsel

for the appellant. The inspection of the case verifies the citations and fails to disclose any evidence in contradiction.

The bills of sale were delivered upon the oral understanding that they were such security, and that McIntyre, the debtor, was to continue in possession and dispose of the goods from his store in like manner as before the sale, except, however, as agent for Southwick and Wells. All that Southwick and Wells wanted was protection from loss, and the inference is justified that if the proceeds coming to them from the sale of the goods exceeded that amount the surplus was to be accounted for to McIntyre. Southwick, acting for himself and for Wells, went, directly after the interview with McIntyre, in which McIntyre delivered the bills of sale, to the office of counsel. He returned to McIntyre, within an hour after the bills of sale had been delivered, and before they were filed, and presented McIntyre with a paper which he and McIntyre both signed, and which Southwick never filed, but kept for the benefit of himself and Wells. That paper was as follows:

"It is hereby agreed by me, James D. McIntyre, that I will pay over to Thomas L. Southwick all moneys realized upon articles sold, described in the bills of sale made by me to said Southwick and to George Wells, both dated Dec. 29, to be by said Southwick applied in payment of the sums mentioned in said bills of sale due said Southwick & Wells, and I agree to act as their agent in making said sales, and not otherwise. The entire proceeds of such sales to be applied to the reduction of said indebtedness. On the part of said Southwick & Wells we authorize said McIntyre to sell the articles described in the two bills of sale as our agent only, and not otherwise, and on condition that he pay over the proceeds as above and apply them to the indebtedness to us.

"Dated *Dec. 29, 1884.*

"JAMES D. McINTYRE

"THOMAS L. SOUTHWICK."

The inference, justly deducible from this transaction and the paper, is that the oral agreement, contemporaneous with the bill of sale, was, in part at least, reduced to writing, and, hence, to that extent supercedes the oral arrangement and forms part of the same transaction as the bills of sale. The two should be construed together. (*Haydock v. Coope*, 53 N. Y., 69.) This paper con-

clusively shows that the entire transaction was in the nature of a security. The proceeds of all sales are thereby agreed to be "applied in payment of the sums mentioned in said bills of sale due said Southwick and Wells."

Nothing could be due them if the goods had been sold to them in satisfaction or in payment of their claims. Nothing more could be applied in payment upon claims already paid. "The entire proceeds to be applied to the reduction of said indebtedness." This could not be done unless the indebtedness continued, nor could any more be applied in reduction of the indebtedness than sufficient to cancel it; and because no more of the proceeds of the sales is appropriated to the benefit of Southwick and Wells than sufficient to cancel the indebtedness, the surplus did not belong to them, and McIntyre continued the owner thereof, or of an equity of redemption therein, and Southwick & Wells' control over the property would cease with the satisfaction of their claims. (*Charter v. Stevens*, 3 Den., 33; *Cameron v. Irwin*, 5 Hill, 272.) Both papers together, therefore, constituted a mortgage. (*Bragelman v. Dune*, 69 N. Y., 74; *Coe v. Cassidy*, 72 id., 137; *Leitch v. Hollister*, 4 id., 216; *Knapp v. McGowan*, 96 id., 86; *Smith v. Beattie*, 31 id., 542.)

This is a contest between creditors. Southwick and Wells claim as vendees under their bills of sale. If, however, they are mortgagees, and not absolute vendees, they have no title to the goods against the creditors represented by the plaintiff, unless they have taken the statutory steps necessary to validate a mortgage lien against the claims of judgment creditors. The statute (chap. 279, Laws 1833, § 1) declares that "every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor \* \* \* unless the mortgage, or a true copy thereof, shall be filed," etc. Southwick and Wells, at best, only took constructive possession, and left McIntyre in actual possession under the agreement that he should only act as their agent. Such constructive possession is of no force. Actual open and public possession of the mortgagee, to the exclusion of the appearance of control on the part of the mortgagor, is required. (*Hale v. Sweet*,

40 N. Y., 101; *Steele v. Benham*, 84 id., 634; *Crandall v. Brown*, 18 Hun, 461.) Immediate possession is the imperative requirement of the statute; hence possession taken two months later, and when the receiver's title had vested, is of no force. (*Dutcher v. Swartwood*, 15 Hun, 31.)

Both papers constituted the mortgage and only one was filed, hence the statute was not, in this respect, complied with. The statute says "the mortgage" shall be filed, and that means the papers making it, however many of them. (*Ely v. Carnley*, 19 N. Y., 496.) If the defendants rest upon the bill of sale and the oral contemporaneous agreement, it is difficult to see how the statute could be complied with, for in that case one part of the mortgage is written and the other not. The bills of sale omitted a material part of the goods in McIntyre's store, but they were ultimately disposed of by the defendants in the same manner as if they had been included. The referee erroneously, as we think, allowed McIntyre to testify that he intended to include everything, but by inadvertence failed to do so. If we are right in our view that the relation created between McIntyre and Southwick and Wells was that of mortgagor and mortgagees, then this intention of McIntyre to put in the things he left out in no way cures the omission. Clearly, as to the goods omitted from the instrument, Southwick and Wells have no shadow of title against the judgment creditors of Southwick, however much they might have against McIntyre. They have not complied with the statute and, therefore, are not within its protection. Why they omitted any step is an idle inquiry. The referee decided this case upon the theory that the bills of sale gave to Southwick and Wells a title to the property, good against judgment creditors. The appellant urges upon us that if the instruments were bills of sale only, they are fraudulent and void against creditors, because given and received to enable McIntyre to appropriate a portion of the property to his own support and to hinder and defeat other creditors.

We have not thought it necessary to examine the case in that aspect. We think the transaction created the relation of mortgagee and mortgagor, and that the mortgage was void against creditors, not because of fraud but because the statute was not complied with.

Judgment affirmed, with costs.

LUCAS E. SCHOONMAKER AND HIRAM SCHOON-  
MAKER, JR., RESPONDENTS, v. HIRAM B. KELLY,  
APPELLANT.

*Action of replevin to recover goods fraudulently obtained—right of the vendors to deduct, from the amount received for the property sold by him, the value of that portion of the property which could not be replevied and the depreciation in the value of the portion replevied—an assignee for the benefit of creditors cannot object to the failure of the plaintiffs to make a tender to the assignor.*

This action was brought against the assignee of one Dimmick to recover a quantity of goods and chattels sold by the plaintiffs to Dimmick, upon the ground that the property was obtained by fraud. The contract-price was \$273.39, on which there was paid, at the time of the sale, \$100, credit being given for the balance. The sale was made on October twenty-ninth, and the general assignment was made on November twenty-fifth following. The \$100 paid by Dimmick on the purchase was not returned or tendered to Dimmick, nor to the defendant, prior to the commencement of the action, but on the trial there was tendered by the plaintiffs to the defendant twenty-six dollars and sixty-one cents, being the balance of the \$100, after deducting the value of the goods disposed of before the replevy was made and the depreciation in value of the goods replevied.

*Held*, that the tender was sufficient. (LEARNED, P. J., dissenting.)

That the objection that no restoration, or tender of restoration, had been made to Dimmick, could not be raised by the defendant, who, as the assignee of the property for the benefit of Dimmick's creditors, was not a *bona fide* purchaser for value, and must be deemed to have taken the property with notice and knowledge of Dimmick's fraud in obtaining it.

APPEAL from a judgment in favor of the plaintiffs, entered at the Ulster Circuit upon the verdict of a jury, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

The action was brought to recover certain goods and chattels sold by the plaintiffs to one Dimmick, and by the latter transferred by a general assignment to the defendant. A portion only of the goods were replevied, and such portion had depreciated in value to the extent of thirty-five dollars and fifty-two cents. On the trial the plaintiff tendered to the defendant twenty-six dollars and sixty-one cents, the purchase-price paid less the value of the goods not replevied and the loss in value of those which had been replevied.

*John A. Scott*, for the appellant.

*J. Newton Fiero*, for the respondents.

BOOKES, J. :

The action was replevin for a quantity of goods and chattels, sold by the plaintiffs to one W. W. Dimmick, and by him transferred to the defendant, who claimed and held the same as assignee of Dimmick, under a preferential assignment by the latter to him made for the benefit of his, Dimmick's creditors.

The plaintiffs claimed that the property was obtained from them by Dimmick by fraud; and therefore they had the right to rescind the contract of sale, and have return of the goods.

The sale was made October 29, 1884, and was of property at the contract price of \$273.39, on which there was paid at the time \$100, and credit was given for the balance; whereupon the goods were delivered to Dimmick. On the twenty-fifth of November, twenty-seven days thereafter, Dimmick made an assignment of his property for the benefit of his creditors, to the defendant, who took possession, which possession included the goods remaining undisposed of, so as aforesaid sold to Dimmick and replevied in this action. The \$100 paid down by Dimmick on the purchase, was not returned or tendered to the latter, nor to the defendant, prior to the commencement of the action; but on the trial there was tendered by the plaintiffs to the defendant, twenty-six dollars and sixty-one cents, being the balance of the \$100, after deducting the value of the goods disposed of before the replevy was made, including the depreciation on the goods replevied. The tender was not accepted. The verdict of the jury was for the plaintiff; and judgment having been entered the defendant appealed.

There was evidence tending to establish the fact charged, that the property was obtained by Dimmick from the plaintiff by fraud—hence, that fact must be deemed settled in the plaintiffs' favor by the verdict; and it follows that the title to the goods remained in the plaintiffs at their election, notwithstanding the formal sale by the latter to Dimmick. The plaintiffs had the right to repudiate and rescind the sale because of the fraud practised upon them; but they were bound to do so promptly on discovering the fraud, and also to restore, or offer to restore, whatever they had received of value on

the sale. Such is the general rule applicable to this class of cases.

Here there is no question but that the plaintiffs elected to rescind the fraudulent sale with all needful promptness, but it is insisted, and the point was saved on the trial to the defendant by an exception to the ruling of the court, that there was no return or offer to return the \$100 paid to the plaintiffs on the sale before the commencement of the action. The answer to this objection is, that on the trial they offered a return of all they had received and held of value to them growing out of the sale, being, too, all that Dimmick or any other person had lost by reason of their act of rescission. This certainly, in equity and justice, should be held sufficient. The wrongdoer could in right claim nothing more, certainly, than to be made good; that is, to be restored to the same position, in point of value, which he held when he committed the fraud, and this should, too, be measured by his own conduct in the meantime, whereby his victim had suffered from his fraud. In other words, he could of right only claim restoration in a way, and to an extent to make him good, in view of his own conduct in the use and disposition of the property fraudulently obtained, from which use and disposition he had derived benefit. It seems that the case was put in this condition on the trial by the tender of the twenty-six dollars and sixty-one cents, and this, according to the doctrine of the case of *Pearse v. Pettis* (47 Barb., 276), was all that the law required by way of return in a case like the present. (See, also, *Ladd v. Moore*, 3 Sandf., 589.)

But a tender of restoration to the defendant in this case was not necessary to the plaintiff's right of recovery against him, and the objection that no restoration or tender of restoration had been made to Dimmick was not open to him as matter of defense. This was so determined in *Pearse v. Pettis*, above cited. The defendant was the assignee of the property for the benefit of Dimmick's creditors, hence was not a *bona fide* purchaser. In law he must be deemed to have taken the property with notice and knowledge of Dimmick's fraud in obtaining it. Thus, as laid down in the case cited, he cannot set up the defense that the plaintiffs from whom the property was fraudulently obtained had omitted to perform their duty and obligation to Dimmick, the original purchaser, by returning, or offering to return, the part of the purchase-money paid; that

he is in no condition to raise the question which could only arise in an action between the plaintiffs and Dinmick, the party to the original contract. This subject received a very careful and elaborate examination in *Pearse v. Pettis*, which case stands, in so far as we have knowledge, unquestioned. See, also, *Kinney v. Kiernan* (49 N. Y., on page 172), where this case is cited with approval, as is also *Stevens v. Austin* (1 Mete., 558). In this latter case the fraudulent purchaser had transferred the property to the defendant, with notice to the latter of the fraud, and the question considered was, whether the plaintiff was bound to tender back the note and money he had received before he could bring his action. The court said: "We think he was not. Not to the defendant; for the plaintiff had received nothing from him. Nor could the defendant raise the question. \* \* \* It was *res inter alios*, with which the defendant had no concern."

Thus, according to the cases cited, the objection that there had been no restoration of the \$100 received by the plaintiff on the sale, was not available to the defendant as matter of defense.

The demand and refusal averred in the complaint is not denied in the answer; besides, this was well proved on the trial.

Some exceptions to rulings on questions of evidence were entered, but after an examination of them we think the record free from error in that regard.

In a case like the present, where fraud is charged, a very liberal rule of examination is admissible in the discretion of the court, and we find no exclusion of evidence against the defendant of which he can justly complain.

The judgment and order appealed from should be affirmed, with costs.

LONDON, J. :

The plaintiffs reclaimed from the general assignee of the fraudulent purchaser goods which they had sold him at the price of \$235.52, but which the fraudulent purchaser had damaged to the extent of thirty-five dollars and fifty-two cents. It was stipulated that they were worth \$200 when reclaimed. Plaintiffs tendered on the trial to the defendant, the general assignee, twenty-six dollars and sixty-one cents. If the defendant is to lose the amount of the deprecia-



tion the tender was enough; if the plaintiffs should lose it the tender was too small by the thirty-five dollars and fifty-two cents. Why should not the defendant, whose assignor fraudulently obtained the goods, sustain this depreciation in value? Suppose the goods had been fraudulently purchased for \$200, defendant paying \$100 upon their purchase-price, had sold none, had damaged them \$100. Defendant is bankrupt, and plaintiff's only practicable remedy is replevin. If they must tender \$100 in order to rescind they can only reclaim goods now worth \$100, and thus lose all.

The law adapts its remedies to accomplish justice. Code of Civil Procedure (§ 1722) allows the plaintiff to recover, in actions of replevin, damages for the injury or depreciation of value of a chattel while in possession of defendant, but requires that the complaint shall set forth the facts. Thus the principle that the fraudulent purchaser ought to sustain such damages is recognized. Here, however, the plaintiffs did not seek an affirmative recovery for the depreciation, but sought to have the amount allowed in diminution of the sum to be tendered. The plaintiffs, as we judge from the complaint, did not know that the goods had been damaged. They found that out after they had taken possession of them. The defendant, as general assignee for the benefit of creditors, occupies no better position than his assignor.

The court adapted the recovery to the proofs, no one was misled and justice was done.

LEARNED, P. J. (dissenting)

One Diimmick bought boots and shoes of plaintiffs to the value of \$273.39 and paid \$100. Soon after he made a general assignment to defendant. Thereupon plaintiffs replevied what they could find of the goods (viz., \$235.52 in value at the selling price) on the ground of fraud in the pretended purchase. The actual value of the goods replevied was stipulated at \$200. Plaintiffs never returned the \$100 to Diimmick or any one. On the trial they offered to pay defendant twenty six dollars and sixty-one cents—that is, the then value of the goods replevied, \$200, and the money originally paid, \$100, less the selling price of the whole goods, \$273.39. Defendant refused to take the money. Plaintiff had a verdict for the goods.

The questions presented are, whether they could retake the goods without returning the money; whether they could return on the trial; whether they tendered enough. In the first place, it is said that the assignee of the fraudulent vendee cannot insist that the vendor should return what he had received, because the assignee was not the party to receive what was to be returned. (*Pearse v. Pettis*, 47 Barb., 276.) But that was not the case of a general assignee. Here the defendant is the general assignee of Dimmick — of all his property except what is exempt. Hence, if money was to be returned by the plaintiffs, the defendant was the person entitled to receive it. The \$100 belonged to him if the plaintiffs were not entitled to it. This was, in fact, acknowledged by plaintiffs when they made a tender at the trial to the defendant.

The plaintiffs had three remedies: First. They could sue for the contract-price. Second. They could sue for the damages on the ground of the fraud. Third. They could rescind the contract and replevy. If they took the last (as they did), then the rights of all the parties "were the same as though there never had been any contract of sale, but the goods had been tortiously obtained." (*Kinney v. Kiernan*, 49 N. Y., 164, at page 168; *Morris v. Rexford*, 18 N. Y., 552, at page 557.) For this reason it has been repeatedly said that the party who would rescind, must return all that has been received. (*Baird v. Mayor*, 96 N. Y., 567, at page 599, and cases there cited; see, also, *Bowen v. Mandeville*, 95 N. Y., 237, at page 240.) There it is said: "He may rescind the contract, and after restoring to the other party whatever may have been received thereon, sue for and recover back the entire consideration paid by him; or, he may retain what he has received and sue for and recover such damages as he can establish have been sustained by the fraud. But these remedies being inconsistent, cannot both be prosecuted and maintained." (See, also, *Floyd v. Brewster*, 4 Paige, 537.)

Again it is said in *Guckenheimer v. Angevine* (87 N. Y., 394, p. 396): "The rule that a party undertaking to rescind a contract for fraud must restore to the other party what he has received under it is firmly established by authority. The person defrauded cannot at the same time avoid the contract and retain *anything* received by virtue of it, of value either to himself or to the party who committed the fraud."

It is thought that the case of *Ladd v. Moore* (3 Sandf., 589) asserted a different doctrine. That was an action for damages for trover. Plaintiff had been induced by defendant's fraud to sell him \$480 of goods, taking \$200 in cash and a note. On the trial, plaintiff surrendered the note, and recovered as damages the difference between \$200 and \$480, with interest. This was not an action of replevin, but to recover damages. The principal point discussed is whether a tender should have been made before trial. The money paid was allowed in reduction of the damages.

In *Pearse v. Pettis* (47 Barb., 276), an action to recover property, it was stated that where there had been a purchase by fraud, and the purchaser had paid \$300 on the purchase-price, and the purchaser had made as much as that sum by the use of the property, the vendor was under no obligation to restore anything. But the question was not really involved, because it was held that the defendant, not being the original vendee, was not entitled to receive back anything. It seems to me that that case is hardly consistent with the later cases in the Court of Appeals, above cited, so far as it holds that there is no need to restore to the vendee.

Now to apply the principles held by the Court of Appeals, the most favorable view to plaintiffs is to consider the goods purchased as separable. Then Dimmick bought and paid for \$100 worth of goods, and defrauded plaintiffs out of goods worth \$173.39. They have replevied, therefore, goods which sold for \$62.13, to which they were not entitled, and they offered to pay defendant for these, \$26.61. If the goods sold for \$235.52 have depreciated to \$200, that is plaintiffs' loss, since they assert that the goods have always been theirs. Kelly has caused no damage to the goods, and is not liable for damage. None is alleged. (Code, 1722.)

In another view, plaintiffs have retaken \$235.52 out of the \$273.39 in value which they sold. All, therefore, which they could lawfully retain out of the \$100 received is the difference between \$235.52 and \$273.39, or \$37.87. They should at least have paid the defendant \$62.13. As the case now stands, the plaintiffs have all the goods they ever had, except some which they sold for \$37.87, and they also have \$100 which Dimmick paid them. So they have \$62.13 for nothing.

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THIRD DEPARTMENT, NOVEMBER TERM, 1886.

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The fact is that this offer of plaintiffs on the trial, and the verdict thereon, is really an affirmance of the contract of sale. This sum is computed upon the basis that plaintiffs sold goods to the value of \$273.39, for which Dimmick still owes them, and that they have received therefor in goods \$200, and in cash \$100, leaving balance due Dimmick's assignee \$26.61. So that in this action the plaintiffs rescind the sale in order to replevy, and affirm it in order to retain their money. Thus the principle is overlooked that "the rights of the parties were the same as if there never had been any contract of sale." (*Kinney v. Kiernan, ut supra.*)

The rights of the parties have been adjusted as if there had been a valid contract, and not as if "the goods had been tortiously obtained." If the goods were tortiously obtained then there is no consideration for plaintiffs to retain the \$100, if the sale is treated as a whole. If it is treated as separable, so that they can affirm it as to goods which they cannot find \$37 87 in value, then they should restore \$62.13.

Judgment affirmed, with costs.

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AUGUSTA LINDEMAN, AS ADMINISTRATRIX, ETC., OF WILLIAM LINDEMAN, DECEASED, APPELLANT, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, RESPONDENT.

*Negligence — when the question of the plaintiff's contributory negligence should be left to the jury — right of one finding the gates at a railroad crossing open, to assume that it is safe to cross.*

Upon the trial of this action, brought by the plaintiff to recover damages for the negligent killing of her husband by the defendant, it appeared that on the night of June eighth, at about nine o'clock, when it was "pretty dark," the deceased, a charcoal peddler, in returning home with a team of horses and his empty wagon, reached a place where the highway crossed the defendant's three tracks on grade. On the west side of the tracks, from which side the deceased approached, were gates consisting of two white poles (worked by a crank on the north side of the highway west of the tracks), which were usually lowered

THIRD DEPARTMENT, NOVEMBER TERM, 1886.

when trains were coming, making it impossible to cross the tracks. As the deceased crossed the track he was struck by an engine backing slowly southward, without any light and without ringing any bell or blowing a whistle, and was killed. The gates were up.

Evidence was given tending to show that the deceased, just before reaching the track, was standing in his wagon leaning on the forward part and looking up and down to see if there was any train approaching, and other evidence was given tending to show that the defendant's flagman, who was on the easterly side of the tracks south of the highway, hallooed to the deceased, "stay back." *Held*, that it was error to nonsuit the plaintiff; that, taking all the circumstances into account, especially the open gates, the slowness of the engine's backward motion, the absence of light upon it, the noise which the wagon would naturally make, the question of the negligence of the deceased should have been left to the jury.

APPEAL from a judgment, entered upon an order dismissing the plaintiff's complaint made at the trial at the Albany Circuit.

*John S. Wolfe* and *Eugene Burlingame*, for the appellant.

*Hale & Bulkley*, for the respondent.

LEARNED, P. J.:

This is an action, brought by the administratrix of William Lindeman, deceased, to recover for his death, alleged to have been occasioned by the negligence of the defendant. The plaintiff was nonsuited at the trial on the close of her own evidence, and appeals.

Lindeman was a charcoal peddler and had been in Albany the day of the accident with a load of charcoal. He was returning with a team of horses and his empty charcoal wagon, and about nine o'clock he reached a place where the highway crossed the defendant's three tracks on grade. It was the eighth of June and the night was "pretty dark." As the deceased drove across the track he was struck by an engine of the defendant's, which was backing down southward, without any light upon it and without ringing a bell or blowing a whistle. Across the highway, on the west side of the tracks (from which side the deceased approached), were gates consisting of two white poles which were usually lowered across the highway when trains were coming, and which, when lowered, made it impossible to cross the tracks. After trains have gone by the gates were raised. They were worked by a crank on the north side of

the highway and west of the tracks. At the time of the accident the gates were open. These gates are about six feet from the track nearest them. The first point where a man approaching the tracks could get an unobstructed view of them was about seventy-three feet distant therefrom. One witness testified that the deceased, just before reaching the track, was standing in his wagon leaning on the forward part and looking up and down to see if there was any danger coming. The defendant's flagman, a short time before the accident, had been in the shanty on the south side of the highway and the east side of the track. Soon after that Brown, who was working for a dispatch company, came out of the shanty and stood on the easterly side of the tracks looking south. While standing there he heard the flagman halloo, and turned and saw the engine coming on the west track. It was then a short distance from the crank, which is on the northerly side of the highway where the arm of the gate is let down. The engine must have been at that time near to the highway. Brown then saw the team coming and halloosed "stay back." The distance from Brown to the place of the gate was about fifty feet. The flagman was on the easterly track. The engine struck the forward part of the wagon and did not hurt the horses. They must have crossed the track, coming on a little trot.

There was evidence of negligence on the part of defendant. Absence of light, and no sound of bell or whistle, with open gates, were facts for a jury to consider. As to deceased, the question of negligence is this: Did he do what a prudent man would not, or omit what a prudent man would, have done? (*Kellogg v. N. Y. C. and H. R. R. R.*, 79 N. Y., 72; *Stackus v. N. Y. C. and H. R. R. R.*, Id., 468.) As to the halloosing of the flagman and of Brown, it must be a question for the jury whether that was heard over the noise which a charcoal wagon would make in the ears of one riding therein. The defendant insists that he could have seen the engine if he had looked, and was, therefore, negligent as a matter of law. But he had passed this place before and, therefore, knew of the gates. He saw they were not across the road, and as they were white he undoubtedly saw them standing upright on each side. As said in *Glushing v. Sharp* (96 N. Y., 676), this was an assurance of safety, just as significant as if a gateman had beckoned to him or invited him to come on.

Now, suppose one approached a crossing and a gateman beckoned to him to come on, and suppose he saw an engine slowly backing towards the crossing, a prudent man might infer that the gateman knew that the engine was to stop before it reached the crossing and that there was no danger. It may often be the case that engines are moving near a crossing and towards it which they are not to cross. The gateman knowing this signals the traveler to cross. May he not then cross with prudence although he sees the engine? This engine was not drawing a train. It was a single engine, without cars, backing about five miles an hour. That it was not about to go across the track was notified to the public by the fact that the gates were open. (*Directors of N. E. Ry. Co. v. Wanless*, L. R., 7 Eng. and Irish App., 12; affirming *Wanless v. N. E. Ry. Co.*, 6 Q. B., 481.) The opening of the gates is an affirmative act, giving every traveler to know that the crossing is safe; and though he should see an engine backing at about the rate of a rapid walk, he might think it would stop before it reached the place where the company had, by their signal, said the engine was not to go. How far the witness, Creed, was to be credited was a question for the jury.

Taking all the circumstances into account, especially the open gates, the slowness of the engine's backward motion, the absence of light on it, the noise which the wagon would naturally make, we think that the question of the negligence of the deceased should have gone to the jury. They are the proper judges whether he acted as a prudent man would have done.

Judgment reversed, new trial granted, costs to abide event.

BOCKES and LANDON, JJ., concurred.

So ordered.

JANE M. REID, RESPONDENT, v. HENRY S. TERWILLIGER,  
APPELLANT.

*Civil damage act—1878, chap. 646—when exemplary damages may be recovered against the lessor.*

Where, in an action under the civil damage act, brought against the lessor of the premises and the lessee who sold the liquor, jointly, a case is made which authorizes the recovery of exemplary damages, as against the lessee and seller of the liquor, such damages may also be recovered from the lessor, although they could not have been so recovered if the action had been brought against him alone. (LEARNED, P. J., dissenting.)

APPEAL from a judgment in favor of the plaintiff, entered at the Ulster Circuit upon the verdict of a jury, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

The action was brought, under the civil damage act, to recover damages for the death of the plaintiff's husband, which was alleged to have been caused by liquor sold to him by McLaughlin, a tenant of the defendant Terwilliger.

*M. H. Hirschborg*, for the appellant.

*Gideon Hill*, for the respondent.

LONDON, J. :

The civil damage act (Laws 1873, chap. 646) creates a cause of action unknown to the common law and a new ground of action. (*Volans v. Owen*, 74 N. Y., 526; *Mead v. Stratton*, 87 id., 493)

This cause of action is given for injuries defined by the act and resulting from intoxication. It is given not only against the person who sold the liquor, causing or contributing to cause the intoxication from which the injuries resulted, but also against the person owning or renting the building in which such liquor was sold, having knowledge that intoxicating liquors are to be sold therein. Such person may be sued severally or jointly with the person selling the liquor, and both are declared liable for "all damages sustained and for exemplary damages."

The seller and his landlord were jointly sued in this action. A case permitting the finding of exemplary damages was made



against the tenant. The landlord was shown, to the satisfaction of the jury, to have had knowledge that intoxicating liquors were to be sold in his building. The common law would not make him liable for exemplary damages, but the statute does. The test of liability that the statute imposes upon the landlord is not that he himself should have personally done any wrong, with respect to this particular sale of liquor, but that he should have sustained the relation to his wrong-doing tenant which the statute defines.

"It is evident," say the court, in *Mead v. Stratton (supra)*, "that the legislature intended to go in such a case far beyond anything known to the common law, and to provide a remedy for injuries occasioned by one who is instrumental in producing, or who caused such intoxication." And to make the remedy efficient and ample, it gave it jointly against both landlord and tenant, and embraced actual and exemplary damages. Moreover, the act is entitled "An act to suppress intemperance, pauperism and crime." To expose to these damages the landlord as well as the tenant, was manifestly the legislative instrument for the suppression of these evils.

*Rawlins v. Vidvard* (34 Hun, 205) was an action against the landlord alone. The court held that exemplary damages could not be awarded against him without proof of aggravating circumstances with which he was connected. The court did not hold, and had no occasion to hold, that if both landlord and tenant had been jointly sued, and a case warranting exemplary damages had been made out against the tenant, the landlord would not have been jointly liable with him.

The judgment should be affirmed, with costs.

BOCKES, J., concurred.

LEARNED, P. J. (dissenting):

This is an action under the so-called "civil damage act," brought jointly against Terwilliger, the lessor of the premises, and McLaughlin, the lessee and keeper of the hotel, who sold the liquor.

Terwilliger was in no way connected with the sale of the liquor. There was evidence sufficient to justify the jury in finding that McLaughlin sold the liquor under such circumstances that exemplary damages might be recovered against him. The only question here is whether exemplary damages could be recovered against

Terwilliger, who had no connection with the sale of the liquor, and whose liability was only that imposed by the statute on the owner and lessor of the premises. Exemplary damages under this act can be recovered only when there are circumstances of abuse or aggravation proved. (*Franklin v. Schermerhorn*, 15 Sup. Ct. [8 Hun], 112.) Exemplary damages are allowed against a wrong-doer, and for *example's sake*, as, for instance, against a vendor without license. (*Neu v. McKechnie*, 95 N. Y., 632 at 636.)

If Terwilliger had been sued alone no exemplary damages could have been recovered against him on the facts of the case. He had only leased the premises as a hotel, and this was a lawful and proper transaction. And even if he knew that liquors were sold there, such sale was lawful, for the hotel keeper had a license. There had been nothing done by Terwilliger for which he should be punished to make an example, unless leasing property as a hotel should be punished. There were no aggravating circumstances with which he was connected. (*Rawlins v. Vidvard*, 41 Sup. Ct. [34 Hun], 205.)

If, then, the plaintiff had brought several actions against Terwilliger and McLaughlin she might have recovered against the latter actual and exemplary damages. She could have recovered against the former only actual damages. There is nothing to the contrary in *Bertholf v. O'Reilly* (74 N. Y., 525). The liability under this act is wholly statutory. None such existed at common law. But there is some analogy between the relation of owner and tenant under this statute, and that of master and servant at common law.

The servant may be liable for exemplary damages for his own wrong doing. The master is not then liable for exemplary damages; but he may be so liable for some gross negligence or misconduct on his own part. (*Fisher v. Met. El. R. R. Co.*, 41 Sup. Ct. [34 Hun], 433.)

In other words, exemplary damages are given to punish a man for his own wrong, and not to punish him when he is liable only as superior.

So in the case of owner and tenant under the civil damage act, the owner is, under certain circumstances, made by statute liable for damages. And he may be liable for exemplary damages. But, as

said in *Davis v. Standish* (33 Sup. Ct. [26 Hun], at 615), we must look to the common law to determine when punitive damages may be had. And the common law shows that punitive damages are inflicted (as the word indicates) by way of punishment; and, therefore, for a man's own wrong doing; not for the wrong doing of another, for which he may, however, be liable to respond in actual damages.

The aggrieved party, in cases like the present, may sue the owner and the vendor jointly or severally. The amount of damages which could be recovered against each, when sued separately, might be different. There might be aggravating circumstances against one or against the other. There is no joint act. The privilege of a joint action is only statutory.

If Terwilliger, when sued separately, could not be made liable for exemplary damages, except on the ground of some wrong doing upon his own part, then he should not be liable for such damages when sued jointly.

But the plaintiff urges that she has the privilege of bringing a joint action, and that there cannot be separate verdicts. She was not compelled to sue jointly. It is more reasonable that if she sues jointly she should be limited to a recovery only of actual damages against an innocent person, rather than that an innocent person should be punished by punitive damages for another's malicious act.

The doctrine of exemplary damages is illogical, though settled. It should not be extended to any more illogical conclusions.

The judgment should be reversed.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-  
ENT, v. JOHN PARR, APPELLANT.

*Evidence* — the opinion of a witness, as to who is the person alluded to in a libelous publication, is not admissible — meaning of the term "infamous crime" — a libel is not one.

Upon the trial of the defendant for an alleged libel upon one Leo Oppenheim, it appeared that Oppenheim's name was not mentioned in the libel, but it was

HUN—VOL. XLII 40

42h	313
58a	4365
42h	813
f 66 AD	*571
42h	313
72 AD	'370

claimed by The People that he was the person intended, and that he was pointed out by the words "the Pearl street tailor" and by the name "Leo." A witness, called by The People, who was asked, "When you read this article did you recognize its application to any particular individual?" answered "I did." To the question, "Who was the person that you recognized that this article referred to?" he answered "Leo Oppenheim."

*Held*, that the court erred in admitting the evidence against the objection and exception of the defendant.

That it was for the people to show facts from which the jury might infer that Oppenheim was the person intended by the defendant, and that the opinion of the witness should not have been received.

*People v. Crowell* (3 Johns. Cases, 340); *Genet v. Mitchell* (7 Johns., 120); *Hayes v. Ball* (72 N. Y., 420) distinguished.

Libel is not an "infamous crime" within the meaning of that term as used in section 68 of the Code of Civil Procedure, conferring upon the Court of Special Sessions, in the city of Albany, jurisdiction to try and determine all cases of petit larceny charged as a first offense, and all misdemeanors, "not being infamous crimes," committed within the city.

APPEAL from a judgment of the Court of Special Sessions in the city of Albany, convicting the defendant, John Parr, of the crime of libel, and sentencing him to imprisonment in the penitentiary for the term of six months.

The libel was published by the defendant in a newspaper called "The Owl."

*Edward J. Meegan*, for the appellant.

*Hugh Reilly*, district attorney, for the respondent.

LEARNED, P. J.:

This was a prosecution for an alleged libel upon Leo Oppenheim. His name was not mentioned in the libel, but it was claimed by the people that he was intended, and that he was pointed out by the words "the Pearl street tailor," and by the name "Leo." On the trial a witness was asked, on behalf of the people, "When you read this article did you recognize its application to any particular individual?" He answered "I did." Then he was asked, "Who was the person that you recognized that this article referred to?" and he answered, "Leo Oppenheim." These questions were duly objected to and exception taken. Similar questions were put to two other witnesses; objections made and exceptions taken.

This evidence was improper. It was for the people to show facts

from which the jury might infer that Oppenheim was the person intended by defendant. The testimony of witnesses that they recognized Oppenheim, as referred to, was only the statement of their opinion. And this matter was not one for experts. Their opinion must have been based upon facts known to them. They should have testified only to such facts.

If this kind of testimony were proper, then the defendant could have called witnesses to testify that they did *not* recognize Oppenheim as the person referred to. But such testimony would be plainly improper. This principle is distinctly decided in *Van Vechten v. Hopkins* (5 John., 211); *Gibson v. Williams* (4 Wend., 320); *Maynard v. Beardsley* (7 id., 561, in the Ct. of Errors); *Weed v. Bibbins* (32 Barb., 315); and by implication in *Wright v. Page* (36 id., 441). Two cases were cited by the people as sustaining the court below, viz: *People v. Croswell* (3 Johns. cases, 340), and *Genet v. Mitchell* (7 Johns., 120). In the former no question or decision was made upon this point. The whole discussion is upon the right of a jury to determine the whole issue, and on the right of defendant to show the truth of the statement alleged to be a libel. In the other case the court recognize *Van Vechten v. Hopkins* as sound law. The testimony given by the witness had not been objected to, and was quite immaterial.

- It is said by the counsel for the people that the judgment should not be reversed, because there is evidence that defendant admitted to a witness that Oppenheim was intended. But we cannot say that the jury would have believed the evidence as to this admission, if it had not been fortified by the illegal evidence of the opinions of witnesses.

We are referred to the language of the court in *Hayes v. Ball* (72 N. Y., 420), as supporting the position of the people. The question now under consideration was not involved in that case. It is very possible that in the case of verbal slander, if all the persons who heard the alleged slander testify that they understood the words in a sense entirely harmless, this may be a good defence; because, in that case, the defendant has not conveyed to the mind of any person a charge or disgraceful statement in respect to the plaintiff.

But the present is a very different case. Here is a libelous publication. The attempt is not to show that it was understood by *all*

*readers* in a harmless sense. But the attempt is to show that it is aimed at a particular person by the opinion of several who read it. It is unquestionably proper and important to show that fact. But it must be shown by circumstances surrounding the parties. The circumstances which induced the belief in the minds of the witnesses that Oppenheim was the man intended, would have perhaps produced the same belief in the minds of the jury. At any rate the defendant was entitled to the judgment of the jury on that point.

A question is raised as to the jurisdiction of the Court of Special Sessions of Albany. It has jurisdiction, among other things, of "all misdemeanors, not being infamous crimes, committed within the city." (Sec. 68 Code Crim. Proc.)

The defendant claims that the publication of a libel is an infamous crime.

The repeal, by chapter 593, Laws of 1886 of section 31, title 7, chapter I, part 4, Revised Statutes, has left us to the common law to determine what are infamous crimes. It is quite unfortunate that so important an exception should be expressed in words which have always been somewhat vague in their meaning.

The question what crimes were infamous used to be important principally because a conviction for any of such crimes excluded the convicted person from being a witness. That rule is abrogated. (Penal Code, 714; Code Civ. Proc., 832.)

Still, the words "infamous crimes" in section 68 above cited, must apply to such crimes as were infamous at common law.

Blackstone mentions, as making one infamous, "treason, felony, perjury or conspiracy, or if, for some infamous offense, he hath received judgment of the pillory, tumbrel or the like, or to be branded, whipt or stigmatized, or if he be outlawed or excommunicated, or hath been attainted of false verdict, *præmunire* or forgery." (3 Bl. Com. 370, 364.)

If the punishment inflicted were to determine the question of infamy, then the publication of a libel might have been an infamous crime. (*Tutchin's Case*, 14 State Trials, 1095.)

But the better opinion is, that it is the nature of the crime, and not the punishment, which determines the question, and that an infamous crime is an offense "implying such a dereliction of moral principle as carries with it a conviction of a total disregard to the

obligation of an oath." (Per Sir Wm. Scott, quoted in 1 Green. Ev. 373; Abbott's Law Dict., title "Infamous Crimes.")

In that section Greenleaf gives as the enumeration of infamous crimes: treason, felony and the *crimen falsi*. The publication of a libel certainly is not within the first or the second. Nor is it within the third, the *crimen falsi*; which implies some fraud or deceit, and which of itself must indicate a bad and immoral character.

Now, on the contrary, the publication of a libel, while it may sometimes be done with a very bad intent, does not necessarily imply disgraceful or immoral motives. It is not necessary to refer to the many well known convictions in England of men influenced by patriotic motives, which prove this assertion. Certainly, the crime is not one which involves, necessarily, deception or dishonesty. On the contrary, its *publicity* is of the essence of the wrong.

We do not think, therefore, that the publication of a libel is, in its nature, an infamous crime; though it may sometimes show a malevolent or a contemptible spirit.

The judgment and conviction should be reversed, and new trial granted.

BOOKES and LANDON, J.J., concurred.

Judgment and conviction reversed, new trial granted.

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## PATRICK PRENDERGAST, RESPONDENT, v. THE VILLAGE OF SCHAGHTICOKE, APPELLANT.

*Board of health — expenses incurred in abating a nuisance are to be charged upon the occupant — 1850, chapter 324, as amended by chapter 169 of 1854; chapter 790 of 1867 and chapter 761 of 1868.*

Sections 3 and 4 of chapter 324 of 1850, conferred upon boards of health power to make regulations concerning the suppression and removal of nuisances, and provided that persons violating them should be deemed guilty of a misdemeanor. By chapter 790 of 1867 these sections were so amended as to confer upon the board the power to make orders in special or individual cases, and as amended they authorized the board, when its orders were not complied with, to suppress a nuisance, and directed that the expense thereof should be a charge

on the occupant, or any or all of the occupants, and that it might be sued for and recovered by the board and made it a lien upon the property.

Section 5 of the act of 1850, which provided that "all the expenses" incurred by the boards in the execution of the act should be a county charge, was amended by chapter 169 of 1854, so as to charge the town with so much of the said expenses as should exceed the sum of \$300. Chapter 761 of 1858 amended this section by providing that "all expenses incurred by the several boards of health, in the execution and performance of the duties imposed by this act, shall be a charge only on their respective cities, villages and towns," to be audited, levied and collected as other city, village and town charges.

*Held*, that the provisions added to section 4 by the act of 1867, charging the expense incurred in abating a nuisance upon the occupants of the property, and giving a remedy by action against them and a lien on the premises, was not repealed or affected by the passage of chapter 761 of 1868.

That the latter act must be construed to apply to such expenses only as were not covered by section 4 as amended by the act of 1867.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury directed by the court at the Rensselaer Circuit.

The action was brought for work claimed to have been performed by the plaintiff in abating an alleged nuisance pursuant to the directions of the board of health of the defendant the village of Schaghticoke.

*Henry A. Merritt*, for the appellant.

*Edgar L. Fursman*, for the respondent.

LEARNED, P. J. :

Chapter 324, Laws of 1850, provides for appointment of boards of health. Section 3 defines their powers. In subdivision 3 it is said they may make regulations concerning "the suppression and removal of nuisances." Subdivision 8 authorizes them to employ persons to carry into effect their regulations. Section 5 says that all expenses (except their compensation) shall be a county charge. Section 5 was modified by chapter 169, Laws of 1854, making all over a certain amount chargeable to the towns. This was repealed by chapter 761, Laws of 1868, hereafter mentioned.

Chapter 790, Laws of 1867, very largely amended sections 3 and 4 of the first-named act, extending and amplifying the powers of the boards. By subdivision 6 of section 3, thus amended, the board might make orders in special or individual cases not of general application.



Section 4 of the original act only made a person guilty of a misdemeanor who violated their regulations. As amended, it authorized the board, when its special orders, duly served or posted, were not complied with, to enter the premises and suppress or remove the nuisance. "And the expense thereof shall be a charge upon the occupant, or any or all the occupants of said premises, and may be sued for and recovered, with costs, by said board in the name of such board." Further provision is made for the sale of the premises where the judgment is not collected.

Now it must be observed that, notwithstanding this amendment to sections 3 and 4, section 5 remained undisturbed. That is the section which declared that the expenses of the board should be a charge partly on the counties and partly on the towns. Therefore, it appears that section 5 was in harmony with section 4, as thus amended. So that the expenses of the board, referred to in section 5 (then slightly amended by the law of 1854, above mentioned), were something different from the expense of removing or suppressing a nuisance. This latter expense was expressly provided for in great detail by section 4, as amended by the aforesaid law of 1867. Then came chapter 761, Laws of 1868, which repealed the aforesaid law of 1854 and again amended section 5 of the original law, saying that "all expenses incurred" (using the same language as in the original section) should be a charge on the respective cities, villages and towns.

Now it is claimed that the effect of the amendment of the original section 5 (a section which in varying forms has been in force since the passage of the original act) is to take away the provisions of section 4, as amended by the law of 1867, aforesaid. It seems to us that this is not a proper construction. Section 5 of the original act, in one form or another, has been in force all the time. It was in force when the law of 1867 amended section 4. At that time it provided that the expenses incurred, to the amount of \$300, should be a charge on the county, above that on the town.

When, therefore, leaving that section undisturbed, the act of 1867 provided specially for the case of expenses in entering into premises after notice and suppressing or removing a nuisance; giving a remedy by action and a lien on the premises, it is plain that this was an expense *not* intended in the general provision of section 5,

then in force. The amendment of section 5, by the act of 1868, does not change this reasoning. The amended section 4 still remains, with its special provisions for the special case. The occupant and the premises still remain as much liable as they ever were. If the act of 1868 had been an entirely new enactment there would have been room for the argument that it was intended to change the provisions of section 4, in respect to the payment of expense incurred pursuant thereto. But it is only a modification of an original section.

It may be urged that the words of the act of 1868 are "all expenses." But such were the words of the original section 5 in the act of 1850 (chap. 324), and neither the omission of the word "all" in the act of 1854, nor its insertion in the act of 1868, is material, because, while section 5, amended in 1854, required that the counties and towns should pay the expenses incurred by the boards of health, the act of 1867 so amended section 4 as to make the premises and the occupant liable in the special case therein provided. Thus such expense was evidently excepted from the general provision of section 5, and the act of 1868 only changed the liability for those general expenses, so that a part thereof should no longer be chargeable on the county. But "expenses incurred" still meant what the same words meant when the act of 1867 had been passed. Prior to the act of 1867 there was no provision for imposing any expense on a person or on property. The only compulsory power was that disobedience was a misdemeanor. The act of 1867 changed this, and gave the board power to collect this expense in question from the person or property properly chargeable. There has been nothing intended to abandon that principle.

The defendants insist also that the power to remove and abate nuisances is by the village charter given to the trustees. (Chap. 512, Laws 1867, tit. 3, § 3, sub. 22, p. 1334.) The corporate name was changed to Schaghticoke. (Laws 1881, chap. 75.)

That subdivision makes the expense a lien on the lot. The defendants also cite section 3 of miscellaneous provisions of said act, page 1351, as showing that the village is forbidden to contract any debt or liability, except as therein limited.

In the view we have taken, it is unnecessary to inquire as to the effect of the special provisions of this charter. The question seems

to be settled in *People ex rel. Boltzer v. Daley*, (44 Sup. Ct., 87 Hun, 461.)

In accordance with the provisions of section 4, as amended by the act of 1867, above mentioned, the board of health, in October, 1881, passed a resolution that certain parties be notified to remove a certain alleged nuisance, and that if this was not done the board would remove it and charge expense to the parties. Notice was served on those parties and they did not remove the alleged nuisance.

November 1, 1881, the board accepted a bid of plaintiff for building a culvert to drain a swamp or marsh. This swamp or marsh was the alleged nuisance. December 17, 1881, the board of health audited plaintiff's bill, and a bill of one Hasbrouck, amounting in all to \$523.12. They notified the trustees, December 20, 1881, and requested them to levy a tax for \$523.12.

Subsequently, they served another notice on the trustees with plaintiff's bill attached, amounting to \$613.12, and requested the trustees to levy a tax therefor. The original contract with plaintiff seems to have been for \$480. Other work was done by him under the direction of the president of the board, worth \$120.

Now, without examining several questions that are made, viz.: whether the swamp was a nuisance; whether the board was properly constituted, and the like, it appears to us that this expense of suppressing and removing a nuisance is governed by the aforesaid section 4, as amended by the act of 1867. It is an expense to be paid by the occupant or charged upon the premises.

Such was the view of this board when they served their notice of October upon the parties. This is a just view. The suppression of a nuisance should be at the expense of the person who maintains it, and not at the expense of the village.

We think that the act of 1868, which amended section 5, did not affect the provisions of section 4, as amended in 1867. But that the expenses meant in section 5, have always been, and are such as have not been specially provided for by section 4, as amended, or otherwise.

In construing these acts, we must treat the amendments as if they were incorporated into the statute, and must read the statute as a whole.

Reading the act of 1850, with sections 3, 4 and 5 as they now

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THIRD DEPARTMENT, NOVEMBER TERM, 1896.

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stand, we have the special provision of section 4 for the expense of suppression of nuisances, making such expense a liability of the occupant and a charge on the premises.

Then following we have section 5 as to expenses incurred by the boards to be charged on the villages, etc. We must consider that this section is qualified by that which precedes and applies to expenses not provided for by section 4.

The judgment should be reversed, new trial granted, costs to abide event.

BOOKES and LANDON, JJ., concurred.

Judgment reversed, new trial granted, costs to abide event.

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PETER H. PULVER AND OTHERS, RESPONDENTS, v. SAMUEL S. SKINNER, APPELLANT.

J. WRIGHT OLMSTEAD, RESPONDENT, v. SAME, APPELLANT.

ERASTUS DARLING AND ANOTHER, RESPONDENTS, v. SAME, APPELLANT.

*Bond — right of one, not a party to it, to enforce an agreement by the obligor to pay a debt, due to the claimant from the obligee's ancestor.*

In consideration of the conveyance to him of certain real and personal property, Robert Clements assumed and agreed to pay certain indebtednesses of his grantors', W. and B. Van Vranken, and to save them harmless therefrom. After Robert's death, his administrator, John Clements, entered into an agreement with one Skinner, the defendant herein, as executor (no testator being named), by which it was agreed that John Clements should convey, or cause to be conveyed, the said property, to Skinner, and that Skinner should pay such indebtedness. Subsequently the widow and all the heirs of Robert Clements (except a minor) conveyed the real estate to the defendant Skinner, as executor of Peter Skinner, deceased, in consideration of \$11,000 and a bond to be executed by him, and covenanted that the minor would convey, which he subsequently did. In consideration of this conveyance, Skinner executed to John Clements, administrator of Robert, and attorney in fact for the widow and heirs, a bond, reciting the existence of the claims against the estate of Robert and specifying them; the conveyance was on the express agreement that Skinner would pay the debts and save said estate harmless. The condition was that the obligor should pay, or cause to be paid, the aforesaid claims and save the

said estate harmless, and within four months deliver receipts for such payments to the obligee, and by the bond he further agreed "to and with the owners of said claims to pay all that is justly due them, not exceeding the aforesaid amounts."

*Held*, that an owner of any of the said claims could maintain an action against the defendant, upon the bond, to recover the amount due to him from the Van Vrankens.

*Frooman v. Turner* (69 N. Y., 280) distinguished.

APPEAL by the defendant from a judgment entered at the Saratoga county Special Term.

In 1882 William and Benjamin Van Vranken conveyed to Robert Clements real and personal property, in consideration whereof he assumed and agreed to pay certain indebtedness of the Van Vrankens, and to keep them harmless therefrom. Robert Clements subsequently died, and John Clements was appointed his administrator. Subsequently an agreement was made between John Clements, administrator, and Samuel S. Skinner, the defendant, named therein as executor (but not of any person), reciting the conveyance by the Van Vrankens and the assumption of their debts by Robert Clements, and the intention of the parties that the real and personal property should be transferred to Skinner, as executor, upon his assuming and paying the said indebtedness; and then containing an agreement that John Clements would convey, or cause to be conveyed, said property, and that Skinner would pay such indebtedness. It was agreed that this should be done within nine months.

Subsequently, and within nine months, the widow and heirs of Robert Clements (excepting a minor heir) conveyed said real estate to said Skinner, as executor of Peter Skinner, deceased, in consideration of \$11,000 and of a bond executed by him, and covenanted that the minor should convey. In consideration thereof, Skinner, the same day, April 12, 1884, executed to John Clements, administrator of the estate of Robert Clements, and as attorney, in fact, of the widow and heirs-at-law, a bond in the penal sum of \$6,080.28. The bond recites that there exist certain claims against the estate of Robert Clements, specifying them; that the widow and heirs have conveyed to the obligor certain real estate on the express agreement, as a part of the consideration, that he would pay the debts and save the estate harmless. The condition is that the obligor will pay, or cause to be paid, the aforesaid claims and save said estate harmless,

and within four months will deliver receipts for such payments to the obligee. And the bond continues: "And for the consideration aforesaid the party of the first part agrees to and with the owners of said claims to pay all that is justly due them, not exceeding the aforesaid amounts."

Subsequently the heir of Robert Clements, who was a minor at the time of executing the deed, conveyed his share. These actions are by creditors named in the bond to recover their claims.

*Jacob W. Clute and L. Varney*, for the appellant.

*James Van Voast*, for the respondent.

LEARNED, P. J.:

The first point is, that the first action is by Wait, Pulver & Rockwell, while the creditors named in the bond were Wait & Pulver. But evidence was given tending to show that the claim in question was contracted in dealings under the name of Wait & Pulver. The amount of the claim is that stated in the bond, and the claim itself is traced from its origin in an indebtedness of William and Benjamin Van Vranken. The obligation assumed by defendant was not that of a mere guarantor. He was to pay the debts, and as between him and the estate of Robert Clements he became principal debtor. It was enough to show that this was one of the claims he became liable to pay.

Some stress was laid by the defendant on the fact that the conveyance was executed to him as executor. But that is immaterial. He chose to take the conveyance in that form. Even if it had been made, at his request, to a third party, still the consideration for his bond would have been sufficient. Nor is it material that the minor heir did not convey at the time when the bond was given. The defendant accepted the covenant of the other heirs, and that covenant has been performed.

The next, and the principal point, is whether this is a case in which these creditors can sue upon an agreement to which they are not actual parties.

We do not think it necessary to go over all the cases bearing on this point and to show the distinctions which run through them. It is enough to call attention to the position of the parties. The

widow and heirs of Robert Clement held this property. Robert Clement, in his life-time, was personally bound to pay these Van Vranken debts, and the property was probably liable therefor also in equity. At any rate, on his death this property became liable to pay his debts. It is not necessary to say that the debts were strictly a lien, but they could through proper proceedings be enforced out of the property. At the same time the widow and heirs were not personally liable for the debts.

Under this condition of affairs they transfer this property to the defendant, on his express agreement, not merely to appropriate the same to these debts, but himself to pay the debts and to save the estate harmless. For this he has received and retains an ample consideration. If the obligee had been liable for the debts the case would have been plainly within *Barlow v. Myers* (64 N. Y., 41). But it is urged that, as the widow and heirs were not personally liable, Skinner is not by the bond liable to the creditors, under the rule laid down in *Vrooman v. Turner* (69 N. Y., 280). In the opinion given in that case, the right of the third party to have an action upon the promise is said to depend first, on the intent of the promisee to secure some benefit to the third party, and second, on some privity between the two, the promisee and the third party, and some obligation or duty owing from the former to the latter.

There can be no question, in this case, of the intent of the promisee to secure a benefit to these creditors. The last clause of the bond is an express agreement of the defendant, "to and with the owners of these claims, to pay all that is justly due them." The bond was not one of mere indemnity to the obligee. It was for actual payment to the creditors.

We must then inquire whether there was a privity between them, and an obligation or duty owing from the promisee to the creditors.

As administrator and as widow and heirs of Robert Clement, the parties named in the bond were in privity with the creditors of Robert Clements. There was not, it is true, a personal obligation on them to pay the debt. But we think that there was some obligation or duty resting on the administrator and on the heirs in respect to the creditors. It was the duty of the administrator, in default of sufficient personal property, to cause the real estate to be applied to the debts. And the heirs themselves might be sued

by the creditors in respect to any land of the deceased in their possession, and might be made personally accountable for any which they had sold. (Code, sec. 1843, *et seq.*)

Thus, heirs do not stand in a position simply like that of the owner of an equity of redemption who is not liable for the mortgage debt. He clearly has no duty towards the mortgagee. If he sells the property, he does not become liable for the debt. The lien is fixed, and he cannot disturb it. But the heir who sells may, in some cases, become personally liable. It may then be justly said that the heir is under some obligation or duty to the creditor of the deceased, within the principle applicable to these cases.

When, therefore, in performance of that obligation, the heirs have thus provided for the payment of these debts, it is equitable that the creditors should be allowed to have the benefit of that arrangement, although not actually parties to the instrument.

Here the heirs have made a specific appropriation of this land as a consideration for the payment of these debts. And the principle that a third party may have an action on a contract made for his benefit could seldom have a more beneficial application.

The judgment should be affirmed, with costs.

BOOKES and LANDON, JJ.

In each case judgment affirmed, with costs.

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IN THE MATTER OF THE ESTATE OF ADOLPH R. VAN DERMOOR, DECEASED.

*Surrogate's Court — when money received by an executor under a policy of insurance on the life of the testator is not assets of his estate.*

Upon the application of the petitioner, the widow of one Van Dermoor, an order was made by a Surrogate's Court directing the executor of Van Dermoor to pay to the petitioner the money received by him, under a policy of insurance upon the life of the deceased which made the amount insured payable "to the said assured, his executors, administrators or assigns, \* \* \* for the benefit of his widow, if any."

*Held*, that the money belonged to the widow, and was received by the defendant, not as assets of the estate of the deceased, but that he received it as a trustee under the policy for the widow.

That the order should be reversed, as the surrogate had no jurisdiction to make it.

42	326
68	152
42	326
80	110



THIRD DEPARTMENT, NOVEMBER TERM, 1886.

APPEAL by William Van Dermoor, as executor of Adolph R. Van Dermoor, deceased, from a decree of the Surrogate's Court of Schenectady county, requiring the executor to pay Nancy E. Van Dermoor, the petitioner herein and the widow of the testator, \$1,727.69, the proceeds of a life insurance policy issued upon the life of the testator by the New England Life Insurance Company.

*Jacob W. Clute and Alonzo P. Strong*, for William Van Dermoor, the executor, appellant.

*W. T. L. Sanders*, for Nancy E. Van Dermoor, petitioner, respondent.

LEARNED, P. J. :

The question whether the surrogate had jurisdiction to order the executor to pay this money to the petitioner involves an inquiry into the nature of the alleged liability of the executor to her. The deceased had taken out a policy on his life. The amount insured was made payable "to the said assured, his executors, administrators or assigns, \* \* \* for the benefit of his widow, if any." The money has been paid to the executor, and the petitioner is the widow of the deceased. A question is made whether she is entitled to the money. But, without stating the facts on which that depends, we are first met with the question whether her's is such a claim that the surrogate could order its payment, even assuming that it was valid.

In one part of the opinion of the learned surrogate, speaking of the phrase "personal estate," in a certain paper, he said : "It means the estate which goes into the hands of the executor to be administered under the will, and does not include the insurance money." Thus he indicated that the insurance money was not a part of the estate which goes into the hands of the executor to be administered under the will. If this view be correct, it would seem to follow that he would have no jurisdiction over the matter. But he must have considered that, as the money was in the hands of the executor and did not belong to the estate, the estate owed it to the petitioner. For, in another place, he says that the estate is *debtor* to the petitioner. And he assumes that he has "power to enforce the payment of this indebtedness."

The counsel for the executor insists that if the petitioner's claim is valid, then the amount received from this policy was not assets of the estate, to be accounted for under the jurisdiction of the surrogate. In this we think he is correct.

If there were no beneficiary named in the policy, probably the amount received would be assets. But where there is a beneficiary, we think the amount received is not assets, for it belongs to the beneficiary, and not to creditors or legatees. And it belongs to her (if at all), not by virtue of any will of the testator, or of any administration of his estate, but by a contract of the company, under which they were to pay it (as she claims) *for her benefit*. The executor, therefore, has, in this particular (if the petitioner is right), no will of the testator to execute.

The executors in such a case take the money as trustees for the beneficiary. And they are not trustees under the will; they are trustees under the policy. Hence they are in no sense testamentary trustees. The surrogate has no power to compel them to pay over the money. (*Mareton v. Paulding*, 10 Paige, 40; *Woodruff v. Young*, 38 Sup. Ct. [31 Hun], 420.)

The surrogate places his authority on section 2472, subdivision 4 of the Code of Civil Procedure. But that authorizes him to enforce the payment of debts and legacies and the payment or delivery of money or property belonging to the estate.

Now, the petitioner's claim is neither a debt nor a legacy. The liability, if any, to the petitioner did not arise until the receipt of the money, and hence not until after the testator's death. Hence it is not a liability of the estate, inasmuch as it was not a liability of the testator (*Austin v. Munro*, 47 N. Y., 360); and, as she claims, this money does not belong to the estate. And the concluding clause of the section declares that the jurisdiction must be exercised in the cases prescribed by statute. Section 2481, subdivision 5, does not extend the jurisdiction, nor does subdivision 11 of the same section, as its provisions are limited to matters within the cognizance of the court. The provisions of the statute under which the petitioner seems to have proceeded are sections 2717 and 2718; but these apply to the payment of a debt or of a legacy.

There would be a further difficulty if this case were either a debt or a legacy, viz. — that letters were issued October 31, 1885, and

the petition was presented January 19, 1886 — while a petition by a creditor cannot be presented until six months have expired, and that by a legatee not until a year. And, further, a written answer, duly verified, was filed, setting forth facts showing that it was doubtful whether the petitioner's claim was legal.

The surrogate held that these facts raised only a question of law, and hence he had jurisdiction. If it were necessary to examine this point we should be doubtful whether this was correct. But, in the view we have taken, section 2717 is not applicable to this claim, and, therefore, we need not consider the meaning of section 2718.

We have avoided any expression of opinion as to the validity of plaintiff's claim, and even any statement of the facts on which it is controverted, because we are satisfied that the surrogate was without jurisdiction.

The decree of the surrogate is reversed, with costs below and of the appeal against the petitioner.

BOCKES and LONDON, JJ., concurred.

Decree reversed, with costs of court below and of appeal against petitioner.

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JOHN QUACKENBUSH, APPELLANT, v. HENRY QUACKENBUSH, SANDFORD QUACKENBUSH AND LEVI WALRATH, RESPONDENTS.

*Will — when residuary legatees and devisees do not become personally liable for legacies the payment of which is charged on the residuary estate — statute of limitations — when the right to foreclose a lien to secure a legacy charged on the property is not barred by it.*

Adam Quackenbush died in June, 1806, leaving a will by which, after providing for the maintenance of his wife during her life, he among other things gave to his daughter Betsey \$200 one year after his decease. All the rest, residue and remainder of his estate, not therein otherwise disposed of, and after the payment of his debts and legacies, he gave, devised and bequeathed to his three sons and to their heirs and assigns forever, after the payment of legacies, which legacies he made a lien on all his real and personal estate until paid and satisfied. The

testator left personal property sufficient to pay the debts and legacies, but the sons, who were named as executors, refused to qualify, and the estate was never administered, although the sons took the property and converted it to their own uses.

In 1883 this action was commenced by the plaintiff, to whom Betsey had assigned her claim to the legacy, to enforce the payment thereof by a foreclosure of the lien and a sale of the premises.

*Held*, that the residuary legatees and devisees did not, by accepting and using the property, become personally liable to pay Betsey her legacy. (LEARNED, P. J., dissenting.)

That Betsey's right of action against an administrator of the testator's estate would not be barred, as no judicial settlement had been had.

That any action brought by an administrator of the deceased, if appointed against the residuary legatees as wrong-doers in converting the personal property would, however, be barred by the statute of limitations.

That Betsey consequently had no remedy other than the lien on the land by which she could collect her legacy.

That her equitable right to foreclose the lien would, under the circumstances of this case, subsist for at least twenty-two years from the death of the deceased. That the action could be maintained.

APPEAL from a judgment dismissing the complaint entered in Montgomery county, upon the report of a referee.

Adam Quackenbush died June 10, 1886, leaving a will by which he gave to his widow, Peggy, her support during life, with a right to occupy part of the homestead, and made it a lien on all his property, real and personal. To Betsey, his only daughter, he gives \$200, one year after his decease. To his youngest son, Sandford, \$255, providing the four notes signed with his sons John and Henry, for \$460, are unpaid at his death; if paid, Sandford is to have \$100 one year after his death. The will then provided, "All the rest and residue of my estate, not herein otherwise disposed of, and after payment of my debts and legacies aforesaid, I give, devise and bequeath to my three sons, named John, Henry and Sandford, and to their heirs and assigns forever, share and share alike, after the payment of the legacies above mentioned; and which legacies I hereby make a lien on all my real and personal estate until paid and satisfied.

This action was brought in February, 1883, by the plaintiff, to whom Betsey had assigned her claim, to enforce the payment of the legacy by foreclosing the lien given upon the real estate of the deceased by a sale thereof.

*H. Link*, for the appellant.

*Wendell & Van Deusen*, for Henry Quackenbush, respondent.

*B. A. Ransom*, for Sandford Quackenbush and Levi Walrath, respondents.

LONDON, J. :

The referee held that the statute of limitations barred the plaintiff's action. This conclusion seems to rest upon the proposition that the defendants, Henry and Sandford Quackenbush, who, with the plaintiff, are the residuary legatees and devisees under the will of Adam Quackenbush, by accepting the devise and bequest to them became personally liable for the payment of the legacy of \$200, to their sister Betsey. The legacy was, by the terms of the will, payable one year after the testator's death, which occurred June, 1866, and therefore the right of action accrued to her against them upon their personal liability in June, 1867, and hence was barred either by the six or ten years' limitation; that the lien upon the land devised was controlled by the same limitation. (*Loder v. Hatfield*, 71 N. Y., 92.)

If, however, it is not true that the residuary devisees became personally liable to pay Betsey her legacy, then the above conclusion does not follow, and the only remedy available to Betsey to recover her legacy was by the due course of administration to enforce its payment out of the personal property of the testator, and that failing or being shown to be unavailing, then to foreclose her lien upon the land. In the latter case, her remedy would not be barred until at least six years after the judicial settlement of the administrator's or executor's account. (Code Civil Pro., § 1819.)

The legacy to Betsey is not, by the terms of the will, made payable by the residuary legatees or devisees out of the residuary estate; nor is it made payable by them as the condition of the gift to them of such estate; nor is it in any way to proceed from the residuary estate. The residuary estate is carved out of what shall be left "after payment of my debts and legacies aforesaid." By accepting the residuary estate the defendants were not confronted with any payment to Betsey charged upon that estate or upon themselves; and therefore could not, by accepting it, be held to have promised payment. But the testator made that legacy a "lien on all my real

and personal estate until paid and satisfied." The estate that came to the defendants' hands came with the lien upon it. That lien confers the right upon Betsey to have the aid of a court of equity to enable her to sell the estate if necessary for her payment. This action is to foreclose that lien. The lien is not the security for any personal obligation of the defendants, but for the gift of the testator, and is enforceable because no other remedy remains to the legatee to enforce payment of the legacy.

The testator left ample personal property to pay debts and legacies. This personal property was the primary fund for the payment of this legacy. The portion of it necessary to pay this legacy was not bequeathed to the residuary legatees. If they could take it at all they could only rightfully take it as executors in the first instance, and for the purposes of administration. They declined, although named as executors, to take out letters testamentary, and no administration has ever been had upon the estate. They nevertheless took the personal property and converted it to their own use. They took it as wrong-doers, not as legatees or executors. As wrong-doers the will did not make them personally liable to Betsey. This did not give Betsey the right to sue them to recover her legacy. It gave her the right to have an administrator appointed, and such administrator would have had the right to recover from them this personal property or its full value. (2 R. S., 81, § 60; *Id.*, 449, § 17; *Muir v. Trustees, etc.*, 3 Barb. Ch., 477; *Brown v. Brown*, 1 id., 195; *Wever v. Marvin*, 14 Barb., 376.)

Such proceeding has not been resorted to. We know of no statutory prohibition to a resort to it now. But the statute of limitations (Code Civil Pro., § 392), if such an administrator should now be appointed, would date his appointment within six years from the death of the testator, and his action, if now brought against the residuary legatees to recover the personal property or its value which was of the estate, would be barred by the second six years. (Code Civil Pro., §§ 382, 3343, sub. 10.)

Betsey, therefore, is in this position: Since there has been judicial settlement, her right of action against the administrator of her legacy is not barred. The lien of the legacy upon the real estate exists, by the express terms of the will, so long as her right to enforce the payment of the legacy exists. She can enforce the

lien against the real estate when her remedy against the personal becomes unavailing. It has become unavailing because the statute of limitations would bar any action to be brought by an administrator, if he should be appointed. She, therefore, has no other remedy to collect her legacy than by foreclosing her lien.

This is an equitable remedy, and if, as we doubt, the statute has begun to run against it, it did not begin to run until the legal remedy, through administration, became unavailing; it did not so become until twelve years after the death of the testator. Her equitable remedy subsists at least for ten years more (Code Civil Pro., § 388), or, in this case, twenty-two years from the testator's death.

We think the action is not barred. The plaintiff is the assignee of Betsey; he was one of the residuary devisees and legatees; he mortgaged his undivided one-third of the real estate to his brother, the defendant Henry, who subsequently purchased it upon a sale under this mortgage. Henry thus became the owner, subject to the lien in favor of Betsey. We see no reason why she could not subsequently sell this lien to the plaintiff. The defendant Walrath purchased the land after the commencement of the action, and upon indemnity against the lien. He is in no better position than his grantors.

Judgment reversed, reference discharged, new trial granted, costs to abide event.

BOOKER, J., concurs for reversal.

LEARNED, P. J. (dissenting):

The testator, after providing a maintenance for his widow, gave a legacy of \$200 to his daughter Betsey, and another to his youngest son. He then gave all the residue, "after the payment of my debts and legacies as aforesaid," to his three sons, share and share alike, "after the payment of the legacies above mentioned, and which legacies I hereby make a lien on all my real and personal estate, until paid and satisfied." He made these three sons executors.

Although this does not in express words say that these residuary legatees are to pay the pecuniary legacies, still I think that a fair construction of the language, under the decisions, imposed a personal liability on these residuary legatees, in case they accepted their

devise and bequest, especially if they did so without administering on the estate.

The devise and bequest is "after the payment of the legacies." The three sons claimed to own each one-third of the farm, and so possessed and enjoyed it. The personal property was allowed to remain thereon. And there is abundant proof that they accepted the residuary devise and legacy; although no letters testamentary were issued. Now it is true that, in many cases where acceptance of a devise charged with a legacy has been construed to make a personal liability to pay, there have been express words to the effect that the devisee was to pay the legacy. (*Gridley v. Gridley*, 24 N. Y., 130.)

And here the testator, first speaking of the residue, after payment of debts and legacies, gives it both real and personal to his sons "after the payment of the legacies above mentioned." That is, they were to have the residue on condition that they should pay the legacies; which were also made a charge on the real and personal. They, too, were the executors.

Whether the legacies were payable out of personal or real was immaterial, because the whole residue went to these sons. And when, without taking out letters testamentary, they accepted this devise and legacy, and took all the property under this clause of the will, being entitled thereto only "after the payment of the legacies," they became personally bound to make such payment.

It may be noticed that in speaking of the residue, the testator describes it as the residue after "debts and legacies." Then when he gives this residue to the sons, he says "after the payment of the legacies." The words are not a mere idle repetition. He did not require the sons personally to pay his *debts*. But he did require them to pay these *legacies*.

In this view the action was barred and the judgment should be affirmed with costs.

Judgment reversed, new trial granted, referee discharged, costs to abide event.



THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-  
ENTS v. MICHAEL KURTZ, APPELLANT.

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*Confession of a prisoner — not admitted when induced by a promise that the accused shall obtain the benefit of a State's witness — when the question whether such promise was made should be submitted to the jury — Code of Criminal Procedure, sec. 395.*

In March, 1886, the defendant was arrested in Florida by a special officer of the district attorney of Rensselaer county and an employee of the Pinkerton Detective Agency, for an offense committed in the city of Troy in February, 1884, for which he and another person were indicted in February, 1886. At Washington the party were joined by Robert A. Pinkerton, and at Albany by the district attorney. On arriving at Troy, on Sunday, March 20, the prisoner was taken to the office of the district attorney, where he made a confession to the district attorney in Pinkerton's presence, which was given in evidence on his trial, which occurred on March twenty-fifth. While the party was coming from Washington to the district attorney's office Pinkerton talked with the defendant about the case, the defendant saying to him several times, "What benefit am I to get out of this thing?" to which Pinkerton replied that there could be no promise made to him; that the only benefit that he could get out of the thing, as far as Pinkerton could see, was the benefit that any State's witness would get. When they were in the district attorney's office at Troy Pinkerton said to the prisoner, in the presence of the district attorney: "If you want to make a statement to the district attorney you can do it; you can use your own judgment as to whether you want to make a statement or not; the district attorney will make you no promises."

The district attorney, who was himself sworn as a witness for the people, testified that he said, "Any statement you may make must be voluntary, and you can make one or not as you please," and also stated that he had directed the officers having charge of defendant not to allow any one to speak to him or to accompany him on the way up, and that the defendant was not taken before a magistrate until he was taken into court the next day. At Jersey City the defendant was taken out of the rear end of the train and not brought through the passenger depot, and was thereby prevented from seeing his counsel. While the evidence given upon the trial showed that the crime had been committed, there was nothing to connect the defendant with it (other than the fact of his presence in Troy at the time), except his confession.

*Held*, that the confession was not so clearly shown to have been voluntary as to render it admissible under the provision of section 395 of the Code of Criminal Procedure, excluding confessions "made upon a stipulation of the district attorney that he (the accused) shall not be prosecuted therefor." (Landon, J., dissenting.)

The prisoner's counsel asked the court to charge that if the jury found that the alleged statement was made on a stipulation of the district attorney that the prisoner should not be prosecuted therefor, they must reject it. The judge

refused so to charge, but did charge that they might take into consideration any evidence there might be in the case tending to show that such a stipulation was made, in determining whether the statement or confession made in the district attorney's office was or was not true.

*Held*, that although it was not necessary to decide the question in this case, the court were of the opinion that the judge erred in refusing to so charge.

That while the court must decide preliminarily the question as to whether threats or promises induced the confession, yet where this is a question of fact, depending on conflicting evidence, it should be submitted to the jury.

APPEAL from a judgment entered upon the conviction of the defendant, upon his trial under an indictment charging burglary and grand larceny.

Upon the trial of the defendant, the offense was in great part proven by his confession, made to one Pinkerton and the district attorney. The admissibility of this evidence was contested by the defendant on the ground that the defendant was induced to make the confession by the promise of the district attorney that he should not be prosecuted. Pinkerton was asked by the defendant's counsel :

Q. What, if anything, did you say to him about being a witness for the people? A. I said if he desired to make a statement to the district attorney that he could do so; that he must use his own judgment, as Mr. Rhodes would make him no promises; and Mr. Rhodes said that the statement must be voluntary, that he could make no promises. Q. Please repeat just what you said from Washington to the district attorney's office; if you mentioned a fact to him about making a statement to the district attorney? A. On a number of occasions, when talking with him in regard to this case, he would say, "What benefit am I going to get out of this thing?" And I would say to him that there could be no promise made to him; that the only benefit that he could get out of the thing, as far as I could see, was the benefit that any State witness would get. Q. You did tell him that he would get that benefit? A. No; I said the only benefit that I could see he would get would be a benefit under the law that any State witness would get.

In charging the jury the court said: "The question whether the alleged confession or statement was made in the hope of some benefit to come, or by reason of fear, or under some threat, or supposed stipulation with the district attorney that he should not be prosecuted, so far as the competency or admissibility of that evi-

dence is concerned you have nothing to do with. That was a question of law which the court has already passed upon, and whether it was disposed of correctly or incorrectly is of no sort of consequence to you, and is a question which you are not sitting here to review. But I charge you that you may take into consideration any evidence there may be in this case, if you find there is any, tending to show that any such hope or fears were induced in the mind of the defendant, or such alleged stipulation with the district attorney was made, in determining whether the statement or confession that he made in the district attorney's office was or was not true."

The defendant's counsel requested the court to charge that: "If the jury find the witness, Pinkerton, held out to the defendant the hope that in giving the statement to the district attorney he should receive the benefits of a witness for the State, the jury may, from that circumstance and the other circumstances of the case, find that the alleged statement was made upon a stipulation of the district attorney, that he should not be prosecuted therefor, and if they so find they must reject it as evidence in the case. The court: I decline that, but I say they may consider that upon the question of whether the statement, if made, was true or false."

*Peter Mitchell and Charles E. Patterson*, for the appellant.

*La Mott W. Rhodes*, district attorney, for the respondent.

LEARNED, P. J. :

The defendant and another were indicted in February, 1886, for burglary in the third, and grand larceny in the first, degree. The indictment also charged that the defendant had previously been convicted and sentenced in Massachusetts for a certain offense, which, if committed in this State, would have been a felony.

The alleged offense for which defendant was indicted was committed February, 1884. He was arrested in Florida in March, 1886, by a special officer of the district attorney of Rensselaer county, and also an employee of the Pinkerton detective agency. At Washington, Robert A. Pinkerton joined them, and they all came through to Troy, the district attorney joining them at Albany. On arriving at Troy, Sunday, March twentieth, the prisoner was taken to the district attorney's office. He was arraigned March twenty-second, tried March twenty-fifth, and convicted.

While in the district attorney's office, on Sunday, he made a confession to the district attorney, in Pinkerton's presence. This confession was given in evidence on the trial; and without it there would be substantially no proof of defendant's guilt, as the court held. The most important question raised in the case is as to the admissibility of this confession, and as to a certain part of the charge relative thereto.

The law on this subject is now contained in section 395, Code Criminal Procedure. In *People v. McGloin* (91 N. Y., 241) the court examined many of the former decisions. But it is not intimated that these cases affect the provisions of the Code. Indeed, it is stated that as the crime in that case was committed after the Code took effect, it was governed by its provisions. (See same case, 35 N. Y. Sup. Ct. [28 Hun], 150.)

Then the question must be: Was this confession "made under the influence of fear produced by threats;" or was it "made upon a stipulation of the district attorney that he should not be prosecuted therefor?"

That the defendant was under arrest and that the confession was made to an officer, are circumstances which do not exclude it. (*People v. Wentz*, 37 N. Y., 303; *Cox v. People*, 80 N. Y., 500.)

We have examined the evidence and we see no proof of threats. The defendant urges that there was an excited crowd at Troy; that the defendant was detained in the district attorney's office; that he was not informed of his right to have counsel; that the influence of the detectives was exerted to induce a confession.

Now, while we are not called upon to commend the course of proceedings of these detective agencies, we are yet unable to see that there was such evidence in this case that the court could properly have excluded the confession as made under the influence of fear produced by threats.

The next position is, that it was made upon a stipulation of the district attorney that defendant should not be prosecuted therefor. While Pinkerton was coming up from Washington to the district attorney's office, he talked with defendant about the case. Several times the defendant said to him, "What benefit am I to get out of this thing?" The context shows that this meant, "What benefit am I to get out of making a confession?" And such an inquiry,

made by the prisoner, indicates that Pinkerton had suggested that he should make a confession. Otherwise the prisoner would not have inquired about the benefit to be obtained by "this thing." Pinkerton replied, that there could be no promise made to him; that the only benefit that he could get out of the thing, as far as Pinkerton could see, was, *the benefit that any State's witness would get.*

When they were in the district attorney's office at Troy, Pinkerton said to the prisoner in the presence of the district attorney: "If you want to make a statement to the district attorney you can do it; you can use your own judgment as to whether you want to make a statement or not; the district attorney will make you no promises." What need of promises by the district attorney when his agent, Pinkerton, had intimated to the prisoner that confession would give him the benefit which any State's witness would get? Why was not that intimation withdrawn by the district attorney?

The district attorney, who was himself a witness for the people, states that he said: "Any statement you make must be voluntary, and you can make one or not, as you please." He further states that he had directed the officers having charge of defendant not to allow any one to speak to him or to accompany him on the way up, and that defendant was not taken before a magistrate until he was taken into court the next day.

There is much ground to look with suspicion upon this confession. The prisoner had been brought from Florida without his wife, who had been particularly mentioned as not to accompany him, and under directions by the district attorney that no one should be allowed to come with him but the officers. At Jersey City he had been taken out of the rear end of the train, and had not been brought through the passenger depot. He had been thus (and probably with intention) prevented from seeing his counsel. He was kept in the district attorney's office at Troy, and had no counsel, and apparently no one was allowed to come into that office except the officers and the detective and the district attorney. There he was induced to make his confession, and it was written down.

In the case of *Flagg v. People* (40 Mich., 706), a confession was obtained in the district attorney's office under very similar circumstances, the detective telling the prisoner he had better make a

statement; and the confession was held inadmissible. The court remarked: "A more serious offense was committed in the efforts to obtain a confession than the respondent was guilty of, even if his confession was true as it was a perversion of the process of the law, — *poisoning of the fountains of justice.*"

Pinkerton had been in communication with the district attorney about this case, and the district attorney had given instructions to Pinkerton in regard to the prisoner. Pinkerton, then, was not a merely unofficial person. He was, to some extent, acting for the district attorney; and what he did and said might be deemed to come from the district attorney, unless it were positively disavowed. It would be most unreasonable, under the circumstances, that what Pinkerton said should not be considered as said in behalf of the district attorney. And simply to say, "your statement must be voluntary," did not so repudiate what the detective had previously said as to take away from the mind of the prisoner the influence which had been exerted. (*Porter v. State*, 55 Ala., 95.) In that case two confessions had been made under promises. Before obtaining the third the district attorney assured the prisoner that he could make no promises, etc. But the court held that the third confession was inadmissible; that it should have been explained to the prisoner that the former confessions could not be used against him.

Now, in the present case, the district attorney did not disavow to the defendant the intimation which Pinkerton had previously made that the prisoner might have the benefit of being a State's witness.

We must then consider the language which had been repeatedly used to the prisoner, on the way from Washington, viz., that the only benefit he could get (by confession) was the benefit that any State's witness would get. What did that mean to the prisoner who had been jointly indicted with Porter? Could he not fairly infer that, if he confessed, he would get the benefit which a State's witness would get? If, for instance, the district attorney had himself said to the prisoner: "The only benefit you can get by confession is the benefit any State witness would get." What would this language fairly mean?

It is one of the arts of the detective to intimate, without using straightforward language. Did not Pinkerton mean that the pri-

oner should believe that confession would give him the privilege of a State's witness? And if the prisoner did not so believe, how came he to make that full confession but four days before his trial?

The alleged crime was not recent. It had been committed two years before. The result of the trial showed that, while there was proof that the crime had been committed, there was nothing to connect defendant with it, except his presence in Troy at the time, exclusive of his confession. It is difficult, then, to believe that the defendant would have confessed, unless under some strong inducement.

A confession made under promise that the prisoner might be used as a State's witness must be rejected. And it was rejected where the proof was that the district attorney testified: "He may have said to him that he might be used as a State witness." (*State v. Johnson*, 30 La. Ann., part II, 881.)

Confession on a promise that if the prisoner will turn State's evidence he shall not be prosecuted, was rejected. (*Womack v. State*, 16 Tex. App., 178; *Rex v. Rudd*, 1 Leach, 115; *People v. Whipple*, 9 Cow., 707.)

Confession made where a person in authority induced the prisoner to believe he would get off better is inadmissible. (By Judge Coolly in *People v. Wolcott*, 51 Mich., 612.)

In *Commonwealth v. Taylor* (5 Cush., 605), the prisoner was in custody of three constables. Two then said they could make him no promises, but if he would make a disclosure, they would use their influence to have it go in his favor. The prisoner made no statement. The next day, without any further promises, he made a confession to the third constable. It was held error to admit the confession. It must be shown that the confession was voluntary before it can be received. (1 Green. Ev., 219; *Rex v. Warringham*, note to *Rex v. Baldry*, 2 Den. C. C., 431.)

The prosecutor, it was said, was bound to satisfy the court that the confession was not obtained by improper means. Thus, where the court below had held that the prisoner must show that threats had been made in order to exclude the confession, the judgment was reversed, and the appellate court held that affirmative proof must be given that the confession was voluntary. (*State v. Garvey*, 28 La. Ann., 925; Stephen's Dig. of Evidence, art. 22.)

The learned judge, in commenting upon this language of Pinkerton, said that it "was a statement that under proper circumstances he might—there could be a case in which he could receive some benefit. It was very far from being an inducement." But what proper circumstances were implied? The State witness, it is understood, is to confess and to testify against his associates in the crime. There has been no refusal on the prisoner's part to testify against Porter, indicted with him. What else was he to do to have the promised benefit? What was he to understand from Pinkerton's language?

Now, it certainly cannot be right for the people to take the position that their officer, or one employed by him, used language so deceptive that the defendant believed he had a promise, while, after all, no promise was made him. That was the claim made in *State v. Johnson (ut supra)*, where the district attorney testified: "I *may* have said to him that he *might* be used as a State witness." It certainly cannot be permitted that afterwards the district attorney may decide not to use the prisoner as a State's witness, but to convict him on his confession thus obtained.

The language of the Code, which we are to consider under the light of these adjudged cases, is not accurate. The confession of a defendant is declared to be admissible unless made upon a stipulation of the district attorney that he shall not be prosecuted *therefor*. This grammatically means a stipulation that the defendant shall not be prosecuted *for the confession*. The crime is not mentioned in the section. But the section evidently refers to the practice of permitting one charged with crime to become what was formerly called "an approver," or now a State's witness. (See 4 Bl. Com., 330; *Rex v. Rudd*, Cowp., 331.)

Now it is not necessary to inquire whether a promise by the district attorney that the accused shall not be prosecuted for the crime is legally binding. Certainly the section means that if, by assurance from the district attorney that the prisoner shall not be prosecuted for his crime, the prisoner has been induced to make a confession thereof, that confession shall not be used as evidence against him. And in looking at this question we must remember the principle of morals, that a promise must be taken against the promissor in the sense in which he believed, or should have believed, it was under-



stood by the promisee. It cannot be permitted that the district attorney, or any one who may justly be believed to act for him, can use language which he must have thought would be understood by the prisoner as an assurance of freedom from prosecution, and can thereby obtain a confession; and yet that the people can use that confession, because before the confession was actually made the district attorney said he could make no promises.

In these remarks we are not criticising the action of the district attorney. Very possibly he did not know what Pinkerton had been inducing the prisoner to believe. But he failed to use such language in his own interview that we can feel assured that all well-grounded expectation of obtaining immunity by confession had been taken from the prisoner's mind. "A confession is deemed to be voluntary if (in the opinion of the judge) it is shown to have been made after the *complete removal* of the impression produced by an inducement, threat or promise which would otherwise render it involuntary." (Stephens' Dig. of Ev., art. 22.)

It is important that crime should be punished, but it is still more important to uphold sacredly the principle that no one shall be compelled, or under promise of immunity from punishment induced, to accuse himself. It is still more important to protect all, guilty as well as innocent, against confessions improperly obtained; "the weakest and most suspicious of all testimony, ever liable to be obtained by artifice, *false hopes, promises of favor*, or menaces; seldom remembered accurately or reported with due precision, and incapable in their nature of being disproved by other negative evidence." (4 Black. Com., 357; *Rex v. Buldry*, 2 Den. C. C., 431.) In these views we are of the opinion that the confession was not shown to be so clearly voluntary under the aforesaid section that it was admissible.

It is hardly necessary to discuss at length the other question bearing on this subject, but we will speak of it briefly. The prisoner's counsel asked the court to charge that if the jury found that the alleged statement was made on a stipulation of the district attorney, that the prisoner should not be prosecuted therefor, they must reject it. The judge refused, but charged that they might consider that upon the question whether the statement if made was

true or false. Similar questions were presented in various forms and exceptions were taken.

Now, a confession is not conclusive when it is perfectly voluntary. The jury may still consider all the circumstances upon the question whether it was true or false. There might be facts proven which would show that a voluntary confession was false, and the jury would have a right to consider these facts on the question of the falsity of the confession. On the other hand, a confession obtained contrary to section 395 must be rejected, *even though it be true*.

The position of defendant's counsel is that though the court were justified in admitting the confession, where the evidence was conflicting as to the manner in which it was obtained, yet that the jury should reject it if they should find that it was obtained contrary to that section. To illustrate: If a writing were offered in evidence against a prisoner, purporting to be written by him, and if the question were in dispute whether or not it was so written, the court might admit it in evidence, leaving the jury finally to decide whether it was the prisoner's writing or not, and thus to admit or reject it.

The learned judge, in replying to the requests of defendant's counsel, did not say that there were no circumstances connected with the confession for the jury to consider, hence there evidently were such circumstances, but he charged them that the circumstances were to be considered in determining whether the confession was true or false, and not in determining whether it should be accepted or rejected.

The question here presented does not seem to have been decided in this State. In some States it has been decided favorably to the defendant's position. In *Commonwealth v. Piper* (120 Mass., 185) it was said: "When a confession is offered in a criminal case, and the defendant objects that he was induced to make it by threats or promises, it necessarily devolves upon the court to determine the preliminary question whether such inducements are shown. \* \* \* But if there is any conflict of testimony, *or room for doubt*, the court will submit this question to the jury with instructions that, if they are satisfied that there were such inducements, they shall disregard and reject the confession." This doctrine had been

recognized in *Commonwealth v. Cuffee* (108 Mass., 285); *Commonwealth v. Cullen* (111 Mass., 435); *Commonwealth v. Smith* (119 Mass., 305), and it was subsequently applied in *Commonwealth v. Culver* (126 Mass., 464).

The same doctrine is distinctly laid down in *People v. Barker* (27 N. W. Rep., 539) by the Supreme Court of Michigan, where the trial court, after having admitted the confessions, charged the jury to reject them if they found that they were not voluntary. This was held to be correct.

In *Stallings v. Georgia* (47 Georgia, 572) a confession was admitted. The court charged: "If you do not believe the confessions were freely and voluntarily made, etc., you will have to reject the confession wholly from your consideration." This was held correct.

In *Holsenbake v. Georgia* (45 Ga., 43) it was held that a decision of the judge that confessions are admissible is only *prima facie*. It is his duty to instruct the jury that if they were not freely made they should reject them as evidence.

In *Earp v. Georgia* (55 Ga., 136) a confession induced by a promise went to the jury without objection. Defendant's counsel requested the court to charge that in order to make the confession evidence it must appear to the satisfaction of the jury that it was voluntary, etc. The court refused. Held, error. To this line of cases it is possible that *State v. Vann* (82 N. C., 631) is an exception. The doctrine contended for by the defendant there seems to be established in these States. It appears to us sound. Whether threats or promises induced the confession may sometimes be a question of fact, depending, perhaps, on conflicting evidence. The court must decide preliminarily. But it is reasonable that then the question of fact, if there be any doubt, should be submitted to the jury. It is not necessary to decide that point in this case in the view we have taken. But it is one of so much importance that we have given it a careful examination.

We need not pass upon the other questions in the case.

The judgment and conviction should be reversed, and new trial granted.

BOOKER, J., concurred.

LONDON, J. (dissenting):

I am unable to concur. The rule respecting the admission of confessions has, as I think, been limited by section 395, Code of Criminal Procedure.

That section says, the confession "can be given in evidence, unless made under the influence of fear produced by threats, or unless made upon a stipulation of a district attorney that he shall not be prosecuted therefor."

Unless this confession was made *under* the fear, or *upon* the stipulation defined by this section, the confession "can be given in evidence." That it was not made under the influence of fear produced by threats, or upon any stipulation of the district attorney, seems clear from the fact that it was made under the influence of hope inspired by a promise suggested by the officer having him in custody, that the defendant would, if he made the confession, have the benefit of a State's witness.

The distinction between a confession made under the influence of fear produced by threats, and a confession procured through seductive influences must have been present to the minds of the legislature. The former is practically a violation of the constitutional provision that no person shall in any criminal case be compelled to accuse himself; the latter is open to no such criticism, but presents simply a question of governmental ethics or policy, over which the legislature has power. That it is a departure from the long established common law rule may be conceded, but the legislature made that departure, and the courts must respect it. If there were otherwise any doubt upon the question it would seem to be settled by the language of the commissioners in their first report of the penal code to the legislature. This report may be found in assembly document 150, for 1855. Section 449 of that report is the original draft of the present section 395. In submitting it the commissioners said: "There is, perhaps, no rule of evidence in criminal cases, which has given rise to more discussion in the courts than that which relates to confessions. It is proposed by this section to declare the rule, so that there may be no doubt hereafter, and at the same time to open the door to confessions in many cases where they are now excluded. The law has been too tender in this respect. It should be its policy, as the commissioners conceive, to let, in all the light

possible, trusting to the discretion of juries to distinguish between the false and the true. Confessions not excluded by this rule may be given in evidence, with all the circumstances attending them, and the jury will give such credence to the evidence as its own character and those circumstances may justify."

There was no conflict in the testimony respecting the circumstances under which the confession was made. In no aspect of it could the inference be reasonably drawn that the confession was made under the influence of fear produced by threats; and the district attorney, who refused even to make a promise, as I think, made no representation or statement that could be considered equivalent to a stipulation. Nor do I think this would be suggested, except upon a construction of the statute which the legislature seems to have tried to prevent.

It was, therefore, the duty of the trial court, upon this testimony, to hold that the confession was admissible, and it was proper to instruct the jury that their only duty with respect to it was to consider its truth and effect.

Judgment and conviction reversed and new trial granted.

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WILLIAM H. SMITH, RESPONDENT, v. WATSON MULFORD,  
MARSHALL FRANCIS AND DWIGHT BRANDOW,  
APPELLANTS.

42 347  
3ap188

*Witness — cross-examination to impeach his character — he cannot be asked upon what charge he has been arrested.*

Upon the trial of this action, brought to recover damages for an assault and battery alleged to have been committed by the three defendants, one of them, who was called as a witness in behalf of himself and the other defendants, testified on his cross-examination that he had been arrested, but did not know how many years ago. He was then asked, "What was the charge?" the plaintiff's counsel stating that he offered this evidence with reference to the character of the witness. The court, against the objection and exception of the defendants' counsel, allowed the witness to answer and state what the charge was.

*Held*, that it erred in so doing.

*People v. Irving* (95 N. Y., 541); *People v. Grapo* (16 N. Y., 288) followed; *Connors v. People* (50 N. Y., 240) limited.

APPEAL from a judgment in favor of the plaintiff, entered at the Greene Circuit on the verdict of a jury, and from an order denying a motion for a new trial, made upon a case and exceptions and upon the ground of newly discovered evidence.

*Sidney Crowell*, for the appellants.

*Hallock, Jennings & Chase*, for the respondent.

LEARNED, P. J.:

This is an action to recover damages for assault and battery, alleged to have been committed by Mulford, Francis and Brando. There is no doubt about the affray. The principal matter in dispute was whether plaintiff or defendants commenced the fight.

Mulford was called as a witness in behalf of himself and the other defendants. On cross-examination he testified that he had been arrested, but how many years ago he did not know. Then he was asked by plaintiff's counsel, "What was the charge?" Defendants objected. Plaintiff's counsel stated that he offered this evidence with reference to the character of the witness. The objection was overruled, defendant excepted, and the witness answered. He told what the charge was, the defendants claiming that this was evidence.

Undoubtedly, decisions have been conflicting on this point. In the case of *People v. Irving* (95 N. Y., 541) seems to hold that on cross-examination, specific acts, within the discretion of the court, may be inquired into, tending to impair the moral character of the witness; but that accusations cannot. Such is the doctrine in *People v. Crapo* (76 N. Y., 288); *Ryan v. People* (79 N. Y., 284); *Kober v. Miller* (45 Sup. Ct. [38 Hun], 184).

The distinction seems to be logically sound. An arrest is not an accusation. Every one is presumed to be innocent until proved to be guilty.

To use the fact of an arrest as a ground of discrediting a witness may be logically to presume him guilty until proven innocent.

The case of *Connors v. People*, (50 N. Y., 242), is cited by plaintiff as being directly in point. But in *People v. Connors* (ut supra), the learned judge who wrote the opinion in *Connors v. People* speaks of that case, and of *Brandon v. People* (42 N. Y., 277).

THIRD DEPARTMENT, NOVEMBER TERM, 1886.

and says that the question of relevancy on the point of credibility was not presented. So that the case of *People v. Crapo* must be considered to overrule anything incidentally said in those earlier cases.

The plaintiff further says, that the witness had already stated that he had been arrested. But this did not prevent the defendants from objecting to any more irrelevant testimony. It seems to us that under the late decisions to which we have above referred, the testimony was inadmissible. At the same time we think it would be better to leave the range of such questions to the discretion of the trial judge. That the witness had been arrested was a part of the history of his life, as much as that he had lived in such a place. No real harm was done by the admission of this evidence. The witness could have explained that he was falsely accused and wrongfully arrested, if the facts were so. And whether he explained or not, any judge who has tried cases, knows that practically it would make no difference with the verdict of the jury, that this witness stated that he had been arrested, and mentioned the ground of arrest. These nice distinctions as to what may, and what may not, be given in evidence on such a cross-examination, are of no practical use and really do harm.

But we are compelled to reverse the judgment and grant a new trial, costs to abide event.

BOOKES and LANDON, JJ., concurred.

Judgment and order reversed, new trial granted, costs to abide event.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
HENRY DORR, APPELLANT, v. JOHN BOYD THACHER,  
MAYOR OF THE CITY OF ALBANY, RESPONDENT.\*

42	349
58	241
58	459
42	349
14	p560

42h	349
65	AD 126

*Licenses for places of amusement — in Albany a discretionary power is vested in the mayor — 1883, chap. 298, title 3, sec. 14, subs. 15 and 20 — when its exercise will not be reviewed by the court.*

By subdivisions 15 and 20 of section 14 of title 3 of chapter 298 of 1883, the charter of the city of Albany confers upon its common council power "to pass

\* Decision handed down December 13, 1886.

general, permissive, restrictive or prohibitory ordinances \* \* \* in relation to the regulation of places of public amusement" which "shall be licensed by the mayor, under such regulations for the safety of the public attending them as the common council may by ordinance determine." Section 1 of chapter 30 of the ordinances of the common council provides that "no theatrical or musical entertainment \* \* \* place of amusement \* \* \* shall be had, maintained or kept unless license therefor is first duly obtained." \* \* \* Section 2 of the said ordinance provides that "the mayor *may* issue licenses for the keeping, having and performing of the entertainments above enumerated, upon payment to him" of certain sums specified in the said section, which sums the mayor is by the next section authorized, in his discretion, to reduce. Upon an appeal from an order denying a motion made by the relator for a peremptory writ of *mandamus* requiring the mayor to grant a license for a musical entertainment, to be given by the relator at his place of business, which had been refused by the mayor upon the ground that as the relator kept a saloon where ale and spirituous liquors were sold, musical entertainments there would, in his judgment, have a demoralizing influence :

*Held*, that the order should be affirmed.

That the granting or withholding of the license applied for by the relator was, under the provisions of the charter and ordinances of the city, a right and power vested in the mayor, to be exercised by him entirely in his discretion.

APPEAL from an order made at the Albany Special Term denying a motion for a peremptory *mandamus* requiring the mayor of Albany to issue an amusement license to the relator.

The relator, who keeps a saloon in the city of Albany, applied to the mayor for a license to there furnish, free of charge, to his customers, vocal and instrumental music. He presented a petition, signed by his neighbors, asking that such license be granted, and offered to pay to the mayor the sum of twenty-five dollars, the highest fee fixed by the city ordinance for such licenses. The mayor refused to grant the license, because in his opinion no such license should be granted to any place where liquor is sold.

*Aaron B. Pratt*, for the appellant.

*D. Cady Herrick*, for the respondent.

BOOKES, J. :

This is an appeal from an order of the Special Term, denying a motion for a *mandamus* requiring the defendant, mayor of the city of Albany, to grant to the relator a license for musical entertainments at his place of business in said city. The refusal by the



mayor to grant the license was put on the ground that its issuance rested in his discretion, and that inasmuch as the relator kept a saloon where ale and spirituous liquors were sold, musical entertainments there would, in his judgment, have a demoralizing influence, and therefore he deemed it unadvisable to grant such license. The only question presented on this appeal is whether the granting or withholding of licenses for musical entertainments rests in the discretion of the mayor.

The act providing for the government of the city of Albany (chap. 298, Laws of 1883), confers powers upon the common council "to pass general permissive, restrictive or prohibitory ordinances \* \* \* in relation to the regulation of places of public amusement" (sub. 15 and 20 of sec. 14, title 3 of said act), which, as there declared, "shall be licensed by the mayor, under such regulations for the safety of the public attending them as the common council may by ordinance determine."

This power was exercised by the common council by the adopting of chapter thirty of its ordinances, section 1 of which provides that no "theatrical or musical entertainment \* \* \* or place of amusement \* \* \* shall be had, maintained or kept, unless license therefor is first duly obtained;" and section 2 provides that "the mayor may issue licenses for the keeping, having and performing of the entertainments above enumerated," on payment of twenty-five dollars therefor; or by section 3 of a reduced fee in his discretion.

Now, by the city charter, places of amusement are required to be licensed by the mayor under such restrictions as the common council should by ordinance declare; and that body has by ordinance declared on what condition he may grant such licenses, to wit: On payment of a license fee of twenty-five dollars, or of a reduced fee, in his discretion.

Thus it is manifest, that the entire subject of licensing places of theatrical or musical entertainment devolved upon the mayor by a just and fair construction of the city charter and ordinances, the right to issue or withhold a license in such case resting in his discretion, regulated or restricted only by the payment of a specified license fee; and even this fee was in his discretion as to amount, save as it should not exceed twenty-five dollars. This was a

matter of police regulation, which should in all propriety be exercised in each individual instance by sound judgment.

It was not intended that a license should be granted to every one who should apply for it and tender the license fee, whatever might be his character, or whatever might be the character of the proposed entertainment or amusement.

The policy of the law was clearly to the contrary of this. So the right and power was conferred upon the mayor to discriminate and himself determine who should have license, judging of the character, associations, surroundings and business of the applicant, and also as to the kind or description of the proposed entertainment or amusement, whether it would or would not be in accordance with good order and sound morality. The language of the ordinance is, in strictness, permissive, not mandatory. "The mayor *may* issue license," etc. That it was intended to be permissive is apparent, as we conclude, in view of the object and end to be answered by an observance of the right conferred. It is true the word "may" in a statute is sometimes to be construed "must" or "shall," and is then held like the latter words, mandatory.

This construction will obtain when the statute directs the doing of a thing for the sake of justice or the public good, or when to read it otherwise would defeat or subvert the purpose of the act. These reasons not existing, the ordinary sense of the word "may" is the legal one, and then the word must be held to be permissive, not mandatory. (*Warner v. Beers*, 23 Wend., 156; *Williams v. The People*, 24 N. Y., 409.) In this last case Judge DENIO says: "The primary and most common use of the word *may* certainly is that contended for, namely, the giving permission to perform the act referred to; and where there is nothing requiring it in the connection of the language or in the sense and policy of the provision, I do not think we should be warranted in giving the word an unusual or even a secondary meaning." This language has direct application to the case in hand.

There is certainly in this case nothing "in the connection of the language or in the sense and policy of the provision" requiring that the word "may" should have any other than its ordinary meaning. Indeed the sense and policy of the provision here brought under notice admit, as we think, of no other meaning, as it is plain beyond

THIRD DEPARTMENT, NOVEMBER TERM, 1886.

peradventure that neither protection of public interests or of private right require that "may" should be held to be mandatory. As respects private right, the relator shows no other right than such as pertains to each individual citizen as such. There is manifestly no constitutional question involved in the case, if for no other reason than because the entire subject is one of police regulation.

In conclusion, we are of the opinion that the granting or withholding of the license applied for by the relator was, under the provisions of the city charter and ordinances of the common council, a right and power vested in the mayor, to be exercised by him entirely in his discretion.

Order appealed from affirmed, with ten dollars costs and disbursements for printing.

LEARNED, P. J., and LANDON, J., concurred.

Order affirmed, with ten dollars costs and printing disbursements.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-  
ENT, v. GEORGE CLEMENTS, APPELLANT.

42 353  
26ap481

*Indictment for perjury — the falsity of the facts sworn to by the accused, must be averred therein — evidence of good character — must be considered by the jury in all cases.*

The defendant was convicted of the crime of perjury in willfully swearing, to the best of his knowledge and belief, to the truthfulness of a quarterly report made to the banking department of the State, by the State Bank of Fort Edward, of which bank he was the cashier, which report purported to contain a true statement of the condition of the bank on a certain day therein named. Upon an appeal from the judgment of conviction, it appeared that the indictment did not charge, by direct averments, that the statements made in the report and schedule thereto attached on which the crime of perjury was founded were, or that either of them was, false or untrue; that while it averred, in various forms, that the defendant had knowledge that these statements were false and untrue, it did not directly aver that they were, or that either of them was, in point of fact, false and untrue.

*Held*, that the omission of this allegation was a fatal defect, which required the judgment to be reversed and the defendant to be discharged.

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\* Decided January 4, 1887.

Upon the trial, evidence was given by the prosecution and by the defendant, tending to sustain and refute respectively, the charge that the defendant committed the crime in swearing to the truthfulness of the report. Evidence was also given showing the defendant to have been of good character in all respects, and no evidence was given or offered to gainsay this fact. The judge, in his charge to the jury, said that "such proof is always admissible on a criminal trial, but it is not a defense. When the crime is sufficiently established it is not entitled to any influence." After referring to other cases in which evidence of good character was entitled to great weight, as in those in which it was uncertain by whom the offense had been committed, he added: "If you become convinced that this report, the subject of this indictment, was false; that defendant, at the time, knew it to be false, then previous good character is of no avail whatever." On being asked to charge "that evidence of good character is required to be considered by the jury on the question of guilt," he declined to charge any differently from what he had already charged.

*Held*, that he erred in so doing. (*Remsen v. The People*, 43 N. Y., 6; *Stover v. The People*, 56 N. Y., 315; *People v. Mostt*, 23 Hun, 60-65, followed.)

APPEAL from a judgment of the court of Oyer and Terminer of Washington county, convicting the defendant of the crime of perjury and sentencing him to State's prison for the term of five years and six months.

*Hughes & Northup*, for the appellant.

*Edgar Hull*, district attorney, for the respondent.

BOOKES, J.

This is an appeal from a conviction and sentence of the defendant to the State prison for perjury. The defendant was convicted in the Washington county oyer of the crime of perjury, in willfully swearing, to the best of his knowledge and belief, to the truthfulness of a quarterly report, made by the State Bank of Fort Edward to the banking department of the State, of which bank he was cashier; which report purported to contain a true statement of the condition of the bank on the morning of March 22, 1884.

We are of the opinion that the conviction and judgment in this case must be reversed. There are several errors, as we think, in the admission of evidence, and also error in the charge of the learned judge to the jury, and in his refusal to charge as requested, which require a reversal, as above indicated.

But in view of our conclusion on the objection to the sufficiency

THIRD DEPARTMENT, NOVEMBER TERM, 1886.

of the indictment, hereafter considered, we deem it unnecessary to examine these subjects of error. There is one exception, however, going to the charge of the learned judge and to his refusal to charge as requested, that may well be briefly noticed. The charge of perjury was based on an averment that the defendant committed the crime in swearing to the truthfulness of the report, "to the best of his knowledge and belief;" and evidence was given tending to sustain this charge. The defendant put in proof of a countervailing character, which, as was claimed, showed that the report was according to the best of his knowledge and belief; and he was himself examined as a witness in his own behalf, and gave evidence tending to sustain such alleged defense. Further evidence was also given, showing the defendant to have been of good character in all respects; and no evidence was given or offered to gainsay this fact.

On this branch of the case the learned judge charged the jury as follows :

Defendant has offered proof of his previous good character. That kind of proof is always admissible on a criminal trial, but it is not a defense. When the crime is sufficiently established it is not entitled to any influence. There are cases where that kind of testimony ought to have great weight. Take the case of the commission where it was uncertain who the perpetrator was; and circumstances pointed strongly towards one, so that they tended to establish the crime against him, but leaving it somewhat uncertain; in such a case proof of previous good character would weigh strongly, and it has been said, and very properly, that a man who has a clean character has always one standing witness with him. How far that kind of evidence ought to have weight in the determination of this case depends on how you conclude in regard to the act. If you become convinced that this report, the subject of this indictment, was false; that defendant at the time knew it to be false, then previous good character is of no avail whatever.

Touching these remarks, which were in the nature of instructions to the jury, the defendant's counsel requested the judge to charge "that evidence of good character is required to be considered by the jury on the question of guilt before determining the question of guilt." The learned judge replied to this request: "I decline charging any differently from what I have as to that."

To this ruling the defendant entered exception. This instruction, as we think, should have been given, and its refusal was error. The tenor of the charge was to the contrary of this request. It was to the effect that the proof of defendant's good character should not be considered by the jury, if, upon the other proof in the case, they should reach a conclusion that he was guilty. But the defendant's good character was a subject to be taken into consideration by the jury, in determining his guilt or innocence in the first instance.

Were it otherwise, the evidence would go for nothing in the case; and this, too, when the question was whether the defendant had committed perjury in swearing to matters "to the best of his knowledge and belief," the evidence against him being circumstantial to a very considerable extent, if not wholly so, and as to which there was at least some proof of an exculpatory character — a case of all others where good character might and probably would be an important factor bearing upon the question of innocence or guilt. But the question here presented is not an open one. It is settled favorably to the exception on authority. The charge here given is much like that given in *Remson v. The People* (43 N. Y., 6). The judge in that case instructed the jury that when the evidence is positive, leading to a conviction, logically and fairly derived, of guilty from all the testimony, the simple fact that a person possesses previous good character will be of no avail; that it is only in cases where the jury have a well-reasoned doubt, a doubt logically arrived at, arising from all the testimony that evidence of good character steps in and takes effect. The court held that such charge was clearly erroneous, and well calculated to mislead the jury to the prejudice of the prisoner, and it was then said that "it was delusive to say to the jury that the fact of good character was to be considered in every case, no matter what the other testimony might be, and yet that in a class of cases, by reason of the character of the other evidence, good character would be of no avail; that is, that the jury must exclude from their minds, in the consideration of that class of cases, all evidence as to character. It was in effect saying to them that in such cases evidence of good character was not admissible to affect the result, although permitted to be laid before them. It was error to charge the jury that in any case evidence of good character would be of no avail. There is no case in which the

jury may not, in the exercise of sound judgment, give a prisoner the benefit of a previous good character. No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the improbabilities, that a person of such character would be guilty of the offense charged; that the other evidence in the case is false, or the witnesses mistaken." We extract freely from this case because of the direct application of the argument to this in hand.

To the same effect is the decision in *Stover v. The People* (56 N. Y., 315), and in *People v. Moett* (23 Hun, 60-65). The conviction and judgment should be reversed because of the error above considered, even if the record disclosed no other ground of error.

But we are of the opinion that there is a radical difficulty in the case, growing out of the insufficiency of the indictment. An objection to the sufficiency of the indictment was raised by demurrer; also at the close of the case on the people's evidence; and also by motion in arrest of judgment after verdict. Passing some other points of alleged insufficiency, we do not find it charged by direct averment that the statements made in the report and schedules thereto attached, on which the crime of perjury is predicated, were, or that either of them was false or untrue. It is averred, and in various forms of averment, that the defendant had knowledge that those statements were false and untrue; but there is no direct averment in the indictment that they were, or that either of them was, in point of fact, false and untrue. An averment that the defendant knew they were untrue is quite different from an averment that they were in fact untrue. The one goes to the fact, the other to knowledge of the fact. The indictment is not framed on the theory that the defendant swore to knowledge and belief without having any knowledge or grounds for his belief, as to the facts sworn to by him; hence, that he was guilty of perjury, whether the facts sworn to by him in the report were or were not true; for it is laid in the indictment that he well knew such facts were false and untrue.

The averment that he well knew that the statements sworn to by him were false does not supply an averment that such statements were untrue, in fact, or obviate its necessity. Both averments were necessary to make the pleading good in this case.

It is laid down in Wharton's American Criminal Law that "the general averment that the defendant swore falsely, etc., upon the whole matter will not be sufficient; the indictment must proceed by particular averments (or, as they are technically termed, by assignments of perjury), to negative that which is false. It is necessary that the indictment should thus expressly contradict the matter falsely sworn to by the defendant." (Sec. 2259.) And, further, that in a case like the present, where the accused swears to his belief, it is necessary to aver that the fact sworn to was otherwise, and that he knew the contrary to what he swore to. (Sec. 2261.) The rule of pleading as here laid down is that both averments are necessary in a case like the present. In the *People v. Gates* (13 Wend., 311), where the defendant was indicted for obtaining the signature to a bond and promissory note by false pretenses, the court said: "It is not sufficient merely to state that the defendant did falsely pretend, etc., setting forth the several pretenses; but after stating the false pretenses at large, the pleader must, by averments, falsify each pretense which he intends to rely on at the trial, as he would in an indictment for perjury." In that case the indictment was held insufficient, the court holding that the prosecution must fail: 1. Because the indictment was insufficient; and, 2. If insufficient, then it was unnecessary and improper to receive the evidence of any false pretenses, because none were laid. The Code of Criminal Procedure, section 291, also recognizes the necessity of setting forth in the indictment "proper allegations of the falsity of the matter on which the perjury is assigned." The necessity for such averment arises out of the settled rule that all facts and circumstances necessary to constitute the offense must be specifically stated in the pleading, and that facts not averred cannot be proved, or go for nothing if proved. (*The People v. Gates, supra*; *The People v. Miller*, 2 Park. Crim. Rep., 197.)

On principle, and on the authorities above cited, the omission from the indictment of the averment above considered is fatal to it, and the conviction thereunder cannot, therefore, be allowed to stand. Without such averment the record is imperfect, as it fails to show the commission of the offense of which the defendant is convicted. The objection rests on more than a mere technicality;



it goes to the merits of the case as presented on the record. The conviction and judgment must be reversed, and inasmuch as the indictment is insufficient, the defendant must be discharged.

The conviction and judgment should be reversed and defendant discharged.

LEARNED, P. J., and LANDON, J., concurred.

Judgment and conviction reversed and prisoner discharged.

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THE NATIONAL TRADESMAN'S BANK, RESPONDENT, v.  
MARGARET WETMORE, APPELLANT.

*Action by a creditor to set aside a fraudulent conveyance made by a debtor — it cannot be maintained by a general creditor — proof of the nonpayment of a claim, allowed by the legal representatives in another State, does not show that the plaintiff has exhausted his legal remedies, — although the law of that State will not permit a suit to be brought.*

Upon the trial of this action, brought by the plaintiff to set aside as fraudulent, as against his creditors, a conveyance of certain lands made by one Wetmore to the defendant, his wife, it appeared that the said Wetmore, a resident of Connecticut, in 1882, and while indebted to the plaintiff, a national bank carrying on business in that State, as an indorser of certain promissory notes discounted by the bank for Wetmore, conveyed an interest owned by him in certain real estate, situated in the State of New York, to his wife through a third person. On February 19, 1883, Wetmore made a general assignment for the benefit of creditors, which, by the laws of Connecticut, did not convey any title to or interest in lands out of that State. While suits brought against Wetmore upon the said notes were pending, he died, and the plaintiff being prevented by the laws of Connecticut from obtaining a judgment against the representative of an insolvent estate, proved its claim against the commissioners appointed under the laws of Connecticut, who allowed the same, but paid no part of it.

*Held*, that as the plaintiff was simply a creditor-at-large of Wetmore, he had no standing in court to demand the relief sought.

That the proceedings against the estate of the insolvent merely settled and determined the amount due, and did not amount to a judgment, and that, even if it were deemed a judgment, there had been no execution issued thereon.

*Quare*, as to whether a judgment recovered in another State, with execution thereon unsatisfied there, would aid the plaintiff's case.

APPEAL from a judgment in favor of the plaintiff, entered in Fulton county upon the trial of this action by the court without a jury.

In the year 1882, and prior to the twenty-eighth day of December of that year, the plaintiff, a national bank located at New Haven, Connecticut, discounted for one Abner C. Wetmore, a resident of Meriden, Connecticut, who carried on business at New Haven, eleven promissory notes, amounting in the aggregate to \$5,104.69. At the time of procuring these discounts and loans, Wetmore was the owner of an undivided one-third part of about 11,230 acres of land situated in the county of Hamilton, in this State, and on the 28th day of December, 1882, he deeded these lands to one Campbell, who on the same day deeded them to the defendant, Wetmore's wife, and the deeds were recorded in the Hamilton county clerk's office January 3, 1883, and appear on the record to have been duly signed and sealed, and to be in due form to pass the title to real estate. Both these deeds were voluntary and wholly without consideration, and were made, as claimed by the plaintiff in this action, with the intent to hinder, delay and defraud the creditors of Wetmore, to the knowledge of the defendant. On or about the 19th day of February, 1883, Wetmore made a general assignment, for the benefit of creditors, to one Eli Ives, who, on the nineteenth of April, following, resigned his trust, and one Charles P. Ives was appointed trustee in his stead. By the law of Connecticut this assignment did not convey any title or interest in lands out of that State.

As the promissory notes before mentioned became due, suits were brought upon them, and upon an overdraft, by the plaintiff, in the courts of Connecticut, against Wetmore; and while the suits were pending, and before judgment had been recovered in any of them, Wetmore died intestate, and Charles P. Ives was subsequently appointed administrator of his estate. The plaintiff thereupon took proceedings to revive the suits against the administrator, who applied to the probate court and obtained an order that Wetmore's estate should be settled as an insolvent estate. Under the laws of Connecticut no judgment can be obtained against the representative of an insolvent estate, in course of settlement as such, except for debts due the United States or the State of Connecticut, or for the

expense of the last sickness, or the funeral charges of the decedent. The administrator then appeared in the actions brought by the plaintiff, and set up by plea in abatement in each of those actions, the fact that the estate of Wetmore was in course of settlement as an insolvent estate, and that the cause of action was not within either of the excepted classes, which was sustained by the court, and judgment was rendered dismissing each of the suits.

Commissioners were duly appointed to take proof of claims against the insolvent estate, and their report showed preferred claims to the amount of \$296.93, and unpreferred claims to the amount of \$29,257.89, including \$6,177.64 allowed to the plaintiff. The total amount realized by the trustee of the assigned estate was about \$575, of which about \$200 remained in his hands on the 29th of January, 1885, after paying necessary expenses. At that time no part of the \$296.93 preferred claims had been paid. There are no other assets of either the assigned or decedent's estates in Connecticut or elsewhere, unless something may be realized in a suit brought by the trustee to set aside certain deeds made by Wetmore on the 18th day of December, 1882, of two parcels of real estate in Connecticut.

The court found that the plaintiff had exhausted its legal remedies, and directed a judgment in its favor, declaring the amount due the plaintiff to be a lien upon the real estate conveyed to the wife, and directing that the same be sold by the sheriff.

*S. & L. M. Brown*, for the appellant.

*H. R. Durfee*, for the respondent.

BOCKES, J.:

The plaintiff was simply a creditor-at-large of Abner C. Wetmore, deceased, the late husband of the defendant, to whom, as is alleged, his lands described in the complaint were transferred without consideration and in fraud of the rights of his creditors. Should the title thereto be adjudged to have remained in the husband to the time of his death, still the plaintiff would then have had no lien thereon, either general or specific, for the satisfaction of its claim against him; nor was there then or at any time thereafter, any trust in favor of the plaintiff as respects those claims impressed thereon, legal or equitable, by virtue of any writing creating or

declaring such trust. This being so, the plaintiff has no standing in court to demand and have the relief sought herein, to wit: to have the transfer of the premises to the defendant adjudged fraudulent and void, and payment of its claims against Abner C. Wetmore, deceased, decreed to be made therefrom.

This conclusion is settled by many decisions. (*Evans v. Hill*, 18 Hun, 464; *Adsit v. Sanford*, 23 id., 45; aff'd *Adsit v. Butler*, 87 N. Y., 585; *Geery v. Geery*, 63 id., 252; *Estes v. Wilcox*, 67 id., 264; *Ades v. Bigler*, 81 id., 349.) If it be, as is insisted, that the plaintiff makes a case showing that all attempts by other proceedings to obtain satisfaction of its claims would be absolutely unavailing, still that would not change the settled rule of law declared in the above and other cases.

It is conceded, of course, that in the case of a creditor's bill there must be judgment and execution, and, under some circumstances, a return of execution unsatisfied in whole or part, in order to give the creditor standing in the court to demand and have the removal of a fraudulent transfer by the debtor of his property. This necessity grows out of a statutory requirement (2 R. S., 173, 174, § 38; Code of Civ. Pro., §§ 1871, 1872); but the same rule obtains in all cases where this relief is sought, irrespective of such statutory provision. This was so determined in *Adsit v. Butler* (*supra*), where the subject was discussed at length and on authority; and, indeed, this rule was recognized by the Special Term in this case, but it was found that here the plaintiff had exhausted its remedy at law, and therefore had standing in court to have the relief demanded.

In this conclusion of the learned judge, we think he was in error. The plaintiff was a general creditor, without judgment and execution. Before commencing this action it had taken no proceeding to collect its claim and demands. There had been a proceeding in the Probate Court of Connecticut, under the insolvent laws of that State, wherein commissioners in insolvency had been appointed to administer upon the estate of the debtor, Abner O. Wetmore, who was insolvent and had made an assignment for the benefit of his creditors. The plaintiff presented its claims to those commissioners in insolvency, and the latter allowed them and determined their amount; but nothing was realized thereon from that proceeding. Now, this proceeding, in its results, did not amount to a judgment

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THIRD DEPARTMENT, NOVEMBER TERM, 1886.

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in favor of the plaintiff against Abner O. Wetmore for the amount of the claims of the former against the latter. There was no adjudication that the plaintiff recover the amount against Wetmore. It but settled, determined, the amount due the former from the latter, for the purpose of that proceeding, nothing more; and if deemed a judgment, still there was no execution thereon, even if a judgment recovered in another State with execution thereon returned unsatisfied there, would aid the plaintiff's case. The learned judge was in error, as we think, in holding that the plaintiff had exhausted its remedy at law, within the requirements of the decisions above cited. This conclusion necessitates a reversal of the judgment without considering other questions discussed before us on the argument; and as this objection to the recovery goes to the right of action as made on the complaint, judgment final should be awarded in favor of the defendant, with costs.

Judgment reversed, judgment final ordered for the defendant, with costs.

LEARNED, P. J., concurred; LONDON, J., not sitting.

Judgment reversed, and final judgment for defendant ordered, with costs.

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WILLIAM F. TAYLOR, RESPONDENT, v. ELIJAH J.  
MILLARD, APPELLANT.\*

*Easement — a purchaser of a servient tenement is not bound by an easement not disclosed by deeds or apparent use.*

In 1850 a farm, consisting of 170 acres, was partitioned by a parol agreement between two brothers, Elijah and John, who owned it as tenants in common; seventy acres were set apart to Elijah and 100 acres to John, it being agreed that Elijah and his heirs and assigns were to have the right to enter annually upon the portion assigned to John and gather one-half of the apples growing in an orchard which was situated thereon. In pursuance of his agreement, Elijah and those claiming under him annually entered upon the said 100 acres and gathered one-half of the apples, without objection on the part of those owning and using the same, until the fall of 1884, when the plaintiff, who had in March, 1880, purchased the said 100 acres from a person to whom John had

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Decided January 4, 1887.

conveyed them in 1870, objected to the taking of the apples, and brought this action to recover the damages occasioned thereby.

*Held*, that, as there was nothing in either of the conveyances, nor in the apparent use of either of the tenements by their respective owners, showing or indicating the actual existence of the right now insisted on, and as the plaintiff was bound only by what the record disclosed, he was protected in his absolute title by the recording act.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, rendered upon the trial of this action in the County Court of Rensselaer county.

From the year 1836 and up to on or about the year 1850, John Millard and Elijah Millard, his brother, were tenants in common of a certain farm of about 170 acres of land, situate in the town of Berlin, in the county of Rensselaer and State of New York, and on which was and is situate the apple orchard concerning which this action is brought. In or about the year 1850 the said brothers, being tenants in common, made a parol partition of the 170 acres. It was specified and agreed upon this partition that Elijah should have seventy acres of land, and John the remaining 100 acres, upon which the orchard was wholly and entirely situated; and it was also specified and agreed upon in the same partition that Elijah, his heirs and assigns, was to have the right to enter annually upon the portion partitioned off to John, the said 100 acres upon which was said orchard, and to gather one-half the apples growing and to grow upon the trees of said orchard. In pursuance of this partition, John and Elijah went into possession and occupancy of their respective portions — John occupying the 100 acres and Elijah the seventy acres — and Elijah went each year upon the premises of John and took from the orchard situated thereon one-half the annual crop of apples of said orchard, and continued to do so without objection on the part of John or of any other person up to the time of his (Elijah's) death, in 1854. Elijah left a last will, which was duly admitted to probate by the surrogate of Rensselaer county in 1856. It devised the seventy acres, Elijah's share of land under the partition, to Elijah J. Millard, his nephew, the son of John Millard, and the defendant in this action. The said will also contained a clause giving to Elijah J., his heirs and assigns, "all the testator's right, title and interest to the apples growing or to grow in the orchard situated on the one hundred acres." Under and by virtue of these

provisions of the will, Elijah J. Millard, the said nephew of the testator, took possession of the seventy acres, and went yearly upon the adjoining 100 acres and into the orchard in question, and took therefrom one-half the annual crop of apples, and continued to do so up to 1861, when he deeded the seventy acres and all his right, title and interest therein (together with all the appurtenances) to his sister-in-law, Mary E. Millard. Ever since this conveyance the defendant has gone on the adjoining land, the said 100 acres, and gathered yearly one half the said apples, under the authority and direction of Mary E. Millard, until the autumn of 1884, when the plaintiff, Taylor, objected, and in December of the same year brought suit against the defendant in the Justice's Court. Meanwhile, on March 23, 1870, John Millard, one of the original tenants in common, conveyed the 100 acres which he occupied under the parol partition, to William A. Millard, one of his sons, who subsequently, with his wife, on March 25, 1880, conveyed the same premises to the plaintiff in this action.

*Henry L. Landon*, for the appellant.

*Samuel Foster*, for the respondent.

BOOKER, J. :

If the right to enter and take the apples in question be deemed to be a mere license, resting in parol, it was revocable at the pleasure of the owner of the inheritance. This is settled in *Cronkhite v. Cronkhite* (94 N. Y., 323), and in many other cases. It is doubtful whether this right, however considered, not evidenced by any valid grant or reservation giving it effect as a grant, can be regarded and treated in law as an easement. (*Wiseman v. Lucksinger*, 84 N. Y., 31; *Pierce v. Keator*, 70 id., 419; *Huntington v. Asher*, 96 id., 604.) It is insisted that the right, being coupled with a grant or its equivalent, growing out of a parol partition between former owners, and supported by a consideration, constitutes an easement attached to the seventy acres as the dominant tenement, resting upon the 100 acres as the servient tenement. The difficulty is that there was no valid grant in writing of the right or privilege here asserted by the defendant. It rested in parol merely. It was not contained in any grant, or declared by any reservation in a grant. So it was

not, as it could not be, made a matter of record. Consequently the recording act supervened under which the plaintiff here may claim and have protection. John Willard in 1870 conveyed the 100 acres to William A. Willard by deed, and the latter in 1880 conveyed the premises by deed to the plaintiff. Neither of these conveyances contained any reference to the right insisted on by the defendant; and both deeds were duly acknowledged and recorded. There was nothing in either of these conveyances, nor was there anything apparent in the use of either of the tenements by their respective owners, showing or indicating the actual existence of the right now insisted on. The plaintiff's record title gave no indication of its existence; and he was bound only by what the record disclosed as to the title of the premises conveyed to him, with what was apparent in its occupation and use. It follows, therefore, that the plaintiff, as the case is made on the record before us, is protected in his absolute title by the recording act. We need consider no other question in the case.

The judgment should be affirmed, with costs.

LEARNED, P. J., and LANDON, J., concurred.

Judgment affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK,  
APPELLANT, v. OSCAR F. BECKWITH, RESPONDENT.

*Order granting a new trial, after a conviction of a crime, upon the ground of newly discovered evidence — the people cannot appeal therefrom.*

The defendant having been tried and convicted of murder in the first degree, the judgment and conviction were, upon an appeal taken by him, affirmed by the General Term and the Court of Appeals. Thereafter, upon the motion of the defendant, an order was made, under subdivision 7 of section 465 of the Code of Criminal Procedure, granting a new trial upon the ground of newly discovered evidence. Upon the hearing of an appeal taken by the people from this order to the General Term.

*Held*, that the appeal should be dismissed, as no appeal by the people from such an order was authorized.



APPEAL, taken by the people, from an order granting a new trial to the defendant, on the ground of newly discovered evidence, under subdivision 7 of section 465 of the Code of Criminal Procedure, made by Mr. Justice Ingalls, at chambers, and entered in Columbia county on the 26th day of November, 1886.

The defendant was tried, at the Columbia Oyer and Terminer, before Mr. Justice Ingalls and a jury, upon an indictment charging him with the murder of one Simon A. Vandercook, at the town of Austerlitz, in said county, and convicted of murder in the first degree by a verdict rendered November 20, 1885, and judgment of conviction was thereupon duly entered in said county.

The defendant appealed from said judgment to the General Term of the Supreme Court, where the same was affirmed, and judgment of affirmance was entered in Columbia county, May 2, 1886.

From said judgment of affirmance defendants appealed to the Court of Appeals, where the same was in October, 1886, affirmed, and the case was remitted to the same Supreme Court to be proceeded upon according to law.

The motion for a new trial was made on November eleventh, and the order appealed from was entered on November 26, 1886.

*A. B. Gardinier*, district attorney, for the appellant.

*L. F. Longley*, for the respondent.

LEARNED, P. J. :

Section 462 of the Code of Criminal Procedure, states what a new trial is ; and the following sections down to and including section 466, declare when it can be granted and for what causes. Chapter 65 of the Laws of 1882, amended section 466, so that in case of a sentence of death, the application may be made before execution, and to any justice of the Supreme Court or Special Term thereof, of the judicial department where the conviction was had. The subsequent section 518 declares in what cases the people may appeal. These are two, and no other. First, upon a judgment for the defendant on a demurrer to the indictment ; second, upon an order of the court arresting the judgment. Both of these, it will be seen, are questions of law. The first is evidently so. And a reference to section 467, defining a motion in arrest of judgment, shows that such a motion raises only questions of law. For we have no doubt

that the second subdivision of section 518 refers solely to motions in arrest of judgment. Now, inasmuch as the Code, after careful provisions as to applications for new trial above referred to, proceeded to specify by section 518, the cases where appeals may be taken by the people, and omitted to mention orders for a new trial, we are satisfied that no appeal in such cases is allowed. And this is consistent with general principles. The granting of a motion for a new trial involves a decision of fact rather than of law; an exercise of sound judgment, upon matters of fact. When such a decision has been made, favorable to the defendant, it is somewhat like the verdict of a jury in his favor. The people should have no right to appeal, unless such right is unquestionably given. The people, however, urge that on the affirmance of the judgment by the Court of Appeals, the proceedings were remitted to the Supreme Court. And they further urge that by sections 548 and 549, the record is in this court, and all orders are to be made here which are necessary. They further urge that, as the order for a new trial was made by a justice of this court, an appeal lies to the General Term, substantially as an appeal would lie in a civil action. But we do not agree with this view. This action is still a criminal action. Notwithstanding the new trial was granted after affirmance by the Court of Appeals, and after the cause had been remitted here, still the motion was made under section 466 of the Code of Criminal Procedure, as now amended. An appeal, if it lies at all, must be authorized by the provisions of that Code. It is further urged by the people that section 518 uses the words: "An appeal to the Supreme Court," and hence it does not apply to an appeal *in* that court. But the answer is that if the appeal is not authorized by this section, it is not authorized by any. Section 485 authorizes the clerk to include in the judgment-roll, a copy of the minutes upon a motion for a new trial; and section 517 gives an appeal to the defendant from the judgment, including the proceedings forming part of the roll. But such appeal is not given to the people. And it may be doubted whether even the defendant could bring up by appeal an order denying *after judgment* a motion for a new trial. A majority of the court were of the opinion that such an appeal would not lie, in the case of *People v. Hovey* (37 Sup. Ct. N. Y. [30 Hun], 354). At any rate there is nothing authorizing an appeal by the people.

The people also urge that the order appealed from practically arrests judgment. But the phrase "a motion in arrest of judgment," has long been familiar; and it is defined in accordance with its old meaning in section 467, to which we have already referred. It is evident that it is to such a motion only that section 518, subdivision 2, refers. The appeal should be dismissed.

BOCKES and LONDON, JJ., concurred.

Appeal dismissed.

HANNAH EVERSON, APPELLANT, v. ANDREW McMULLEN,  
RESPONDENT.

*Release of premises from the lien of a mortgage — when the court will not revive the mortgage in favor of the owner of the premises, as against the widow of the mortgagor claiming dower therein.*

In 1877 the plaintiff's husband died, seized in fee of certain premises upon which there was an outstanding mortgage of \$12,000, executed by the plaintiff and her husband. The premises were sold by the husband's executor, subject to the mortgage, for the consideration of one dollar. The purchaser thereafter sold to the defendant a portion of the said premises, which had been, prior to the sale, released and discharged from the said \$12,000 mortgage, the release stating that it was made "to the intent that the lands hereby conveyed may be discharged from the said mortgage."

In this action, brought by the plaintiff to recover her dower in the said premises, so sold to the defendant, the defendant claimed that although the \$12,000 mortgage had been satisfied as to the premises conveyed to him, the mortgage debt had not been paid, except to the extent of \$500; that other mortgages had been executed by the grantees of the husband's executor in substitution for so much of the original mortgage as could fairly be apportioned to this portion of the whole premises; that this was done simply for the convenience of the new purchasers of the several parcels, and that that portion of the \$12,000 mortgage ought, in equity, to be revived and reinstated, and that the defendant should be subrogated to the rights of the original mortgagee, and the plaintiff's claim of dower be limited to the equity of redemption.

*Held*, that regard being had to the nominal price paid for the equity of redemption; to the fact that the widow's claim for dower was not released at that sale; to the intent expressed in the written release; to the favor extended by the law to the widow's claim; to the absence of circumstances showing any mistake other than of law, the defendant had not made a case entitling him to revive and reinstate against the plaintiff a mortgage in which he never had any interest, and under which he derived no title.

APPEAL from an interlocutory judgment entered in Ulster county, upon the trial of this action by the court without a jury.

The action was brought by the plaintiff to recover her dower in certain lands of which her husband died seized.

The court found that Morgan Everson, the plaintiff's husband, at the time of his death, in 1875, was seized of the property in question subject to a mortgage executed by himself and the plaintiff, his then wife, of \$12,000 and some accrued interest, owned and held by the Rondout Savings Bank; that the mortgage covered other lands as well as the lands in question; that in 1877 the lands covered by the said mortgage were sold by the said Morgan Everson's executor, and the sale was duly advertised and fairly conducted in the day-time, and the property was bid in by one Samuel D. Coykendall for the sum of one dollar, subject to the said mortgage, and accrued interest of something over \$2,000; that the said Coykendall immediately assigned his bid to one Charles M. Preston, and the said executor conveyed said premises directly to said Preston; that said Preston and wife thereupon executed and delivered to the said Rondout Savings Bank a bond and mortgage for \$2,000 upon said premises covered by said original mortgage, in payment of said accrued interest; that thereafter said Preston and wife conveyed the said property, covered by the said mortgages, to one Abel A. Crosby, subject to the said mortgages; that the said Crosby and wife afterwards conveyed the premises described in the complaint herein to the defendant, and at the time of this transfer the Rondout Savings Bank satisfied the \$2,000 mortgage and released the said premises conveyed to the defendant from the lien of the \$12,000 mortgage, and at the same time defendant executed back to the said bank a bond and mortgage on the said premises described in the complaint for \$5,500; that the said mortgage was given for the purpose, and was intended to take the place of, the satisfied mortgage and the amount released from the original mortgage, less the sum of \$500, which was paid in cash; and that there was no intention on the part of the parties thereto that the giving of the new mortgage should be regarded as a payment, but that the latter mortgage was to be substituted as a continuation, proportionately, of the Everson mortgage and the satisfied mortgage; that the creation of it, and the release of the Everson mortgage in part, and the sat-

isfaction of the mortgage given for interest, as direct liens, occurred at the same time, and that the transaction was not intended as payment; and that no part of the lands mortgaged by the Eversons has ever stood free and clear of incumbrances since their mortgage; and held, as matter of law, that the plaintiff was entitled to dower only in the equity of redemption of the premises described in the complaint.

*G. D. B. Hasbrouck*, for the appellant.

*Charles M. Preston*, for the respondent.

LONDON, J. :

The plaintiff's husband died seized in fee of the premises. She had joined with him in executing the \$12,000 mortgage, which, with interest, was unpaid at his death. By joining in the mortgage she released her claim for dower in favor of any person who should thereafter acquire title to the premises under the mortgage. She did not unite in any of the conveyances made since the death of her husband, and under which defendant holds title to the portion of the premises now in question. She has not in any way released her claim of dower except by joining in the \$12,000 mortgage. The premises in question have been, since the death of her husband, released from the lien of the mortgage. Her claim of dower is not opposed by any release executed by her, and none exists. It must, therefore, be allowed, unless the mortgage containing her release can be revived and reinstated by the defendant as a bar to her claim of dower. (*Runyan v. Stewart*, 12 Barb., 537; *Hitchcock v. Harrington*, 6 Johns., 290; *Collins v. Torrey*, 7 id., 278; *Coates v. Cheever*, 1 Cow., 479; *Bartlett v. Musliner*, 28 Hun, 235.)

If the \$12,000 mortgage were still a subsisting lien upon the premises, the widow would, against the mortgagee, only be entitled to dower in the equity of redemption of which the husband was seized, unless she or her husband's personal estate contributed to the redemption of the land from the lien of the mortgage.

The defendant here claims that although the mortgagee has been satisfied as to the premises conveyed to him, the mortgage debt has not been paid, except to the extent of \$500; that other mortgages have been executed by the husband's grantees in substitution for so

much of the original mortgage as could fairly be apportioned to this portion of the whole premises, and this was done simply for the convenience of the new purchasers of the several parcels of the whole premises, and that equity ought to revive and reinstate that portion of the \$12,000 mortgage thus released, and that the defendant should be subrogated to the rights of the original mortgagee, and that the plaintiff's claim of dower be limited to the equity of redemption. This view was adopted by the trial court.

We are cited to cases in which the purchaser of the husband's equity of redemption has, instead of paying the mortgage upon the premises, taken an assignment of it, and been allowed to assert the mortgage against the widow's claim of dower. (*Delisle v. Herbs*, 25 Hun, 485; *Russell v. Austin*, 1 Paige, 192.) Also where the mortgagee enters under the mortgage and the husband releases the equity of redemption to him. (*Van Dyne v. Thayre*, 19 Wend., 162.) And where the heir has been compelled to redeem the land the widow, who united in the mortgage, in order to obtain dower, has been obliged to contribute her ratable proportion of the moneys paid to redeem the mortgage. (*Swaine v. Perine*, 5 Johns. Ch., 491.) And where, having the power of sale as executrix of her husband, she sold the land, and her husband's mortgagees took the purchaser's mortgage in place of the one held by them against her husband for purchase-money, the substituted mortgage was reckoned as to the proceeds of the sale the same as the original mortgage in estimating dower between herself and the heirs. (*Evertson v. Tappen*, 5 Johns. Ch., 511.) The court said they were not called upon to decide whether she would have a claim of dower against the purchaser, but intimated that she was probably barred by her own deed. In all these cases the original mortgage was actually or equitably in life. Here the original mortgage no longer exists with respect to the premises held by the defendant.

The husband's equity of redemption was sold after his death by his executor for one dollar. The purchaser, no doubt, deducted the amount of mortgage from the actual consideration. This circumstance was regarded in *Hitchcock v. Harrington* (6 Johns., 294) as showing that the mortgage was redeemed for the benefit of the title acquired under the husband. It was, of course, known that the sale by the executor did not bar the widow's dower, and that the

only way this could be done, without her consent, was to sell the premises under the mortgage. If the sale had also been of her claim for dower, possibly the premises would have brought more.

Of course, the mortgage could have been kept on foot by assignment, as in the cases cited, but this was not done. Perhaps the mortgagee was unwilling to assign a part interest in the mortgage. He could not have been compelled to do so. The release of these premises from the lien of the mortgage declares that it was made, "to the intent that the lands hereby conveyed may be discharged from the said mortgage."

Regard being had to the nominal price paid for the equity of redemption; to the fact that the widow's claim of dower was not released at that sale; to the intent expressed in the written release of the mortgage; to the favor extended by the law to the widow's dower; to the absence of circumstances showing any mistake other than that of law; we do not think that a case was made entitling the defendant to revive and reinstate against the plaintiff, a mortgage in which the defendant never had any interest, and under which he has derived no title. He was purely a volunteer with respect to the original mortgage. He desired to buy the land in which the widow had a claim of dower, subject to diminution because of the mortgage. Instead of buying it subject to the mortgage, he had that mortgage discharged, so that his title would be originally free from it. He, therefore, never was surety for the payment of the original mortgage, and is not entitled to subrogation. (*Wilkes v. Harper*, 1 N. Y., 586.)

The interlocutory judgment should be modified so as to direct the referee to proceed in accordance with this opinion. Costs of this appeal allowed to the appellant. (Code Civil Pro., § 1224.)

LEARNED, P. J., BOCKES, J., concurred.

Judgment interlocutory, modified according to opinion, with costs of appeal, judgment to be settled before LANDON, J.

RUSSELL WHEELER AND OTHERS, RESPONDENTS, v. DAVID  
M. JONES, APPELLANT.

*Extension of time of payment of a debt — not necessarily effected by the acceptance, as collateral security, of accounts not then due.*

The defendant, being indebted to the plaintiffs for goods, wares and merchandises sold to him, assigned, as collateral security, certain accounts against other persons, not yet due, by a written instrument which, after reciting his indebtedness to the plaintiffs, stated that "for the purpose of securing said debt to said firm I do hereby sell, assign and set over to them the following accounts and demands, to wit:"

*Held*, that the plaintiffs did not, by accepting the assignment of the said accounts, extend the time of payment of the debt then due to them, to the time when the said accounts would become due.

*Cary v. White* (53 N. Y., 139) followed; *Durkee v. National Bank of Fort Edward* (36 Hun, 565) distinguished.

APPEAL from a judgment in favor of the plaintiffs, entered in St. Lawrence county, upon the decision of the court upon a trial before the court without a jury.

The action was for merchandise sold by the plaintiffs to the defendant; it was admitted that the plaintiffs were entitled to recover \$778.30, unless they had by accepting the following assignment as collateral security, extended the time of payment; it being also admitted that the several assigned accounts were not due at the time of the commencement of this action: "Whereas, I, David M. Jones, of Canton, am justly indebted unto the firm of Russell Wheeler, Son & Co., of Utica, N. Y., in the sum of thirteen hundred and sixty dollars and sixty four cents; now, therefore, for the purpose of securing said debt to said firm, I do hereby sell, assign and set over to them the following accounts and demands, to wit:" (then follow the names of ten different persons, with a statement of the amount of the account against each one, the aggregate being \$1,688.)

*Chamberlin & Hale*, for the appellant.

*W. H. Sawyer*, for the respondents.

LANDON, J.:

*Cary v. White* (52 N. Y., 139) is to the effect that when there is no agreement to extend the time of the payment of the original



debt, or no substituted agreement made respecting the debt, the mere taking of a mortgage payable at a future time as collateral security for the original debt, does not operate to extend the time for its payment. *Durkee v. National Bank of Fort Edward* (36 Hun, 565), is to the effect, that when the original debt is past due, and the debtor at the request of his creditor, gives him a mortgage to secure its payment, which mortgage appoints a future day of payment, and provides that if payment be then made the mortgage shall be void, then the creditor by accepting the mortgage, accepts its terms.

In the former case the collateral mortgage does not in terms refer to the original debt, nor fix a new day for its payment; in the latter case the original debt is by express terms in the mortgage made payable at a future day. In the case at bar the assignment does not by its terms extend the time of payment of the original debt. Certain accounts against third parties, due in the future, were assigned to the plaintiffs as security, upon the agreement of the plaintiffs that as these accounts became due, they should collect the same and apply the avails in payment of the indebtedness. The plaintiffs now had the original unchanged promise of the defendant and the assigned claims against third parties, but they did not fix a new day of payment of the old debt. They fixed the time when they would apply the proceeds of the assigned accounts, namely, when they should collect them; but they did not agree to postpone collecting the original debt until they should collect the assigned accounts.

LEARNED, P. J., and BOCKES, J., concurred.

Judgment affirmed, with costs.

JANSEN HASBROUCK, RESPONDENT, v. NELSON H.  
BURHANS, APPELLANT.

*Evidence — the recital in a sheriff's deed that an execution has been issued does not prove that fact — statute of limitations — Code of Civil Procedure, secs. 365, 368, 373 — when a possession will be deemed adverse.*

Upon the trial of this action of ejectment, in which both parties claimed title under one Smedes, the plaintiff proved the recovery of a judgment against Smedes, in the Common Pleas of Ulster county, on January 19, 1818; that the deputy county clerk had made diligent search for an execution or *feri facias* upon the judgment and could not find any. He then read in evidence, under the defendant's objection, a sheriff's deed, dated October 15, 1818, conveying the interest of Smedes to one Hasbrouck, under whom the plaintiff claimed, which deed recited the issue of a *feri facias* and the seizure and sale of the property. Neither Hasbrouck nor the plaintiff ever entered into possession of the premises, which were, at the time of the recovery of the judgment and of the sale, in the possession of Smedes, and which, after his death, remained in the possession of his children and those claiming under them, down to the time of the commencement of this action. No other evidence tending to show the existence or issue of the writ of *feri facias* was given.

*Held*, that a finding by the trial court that an execution was duly issued could not be sustained.

That the recital, standing unsupported by any evidence of possession of the premises under the deed, or recognition by Smedes of its validity, or other acts *in pais* tending to support the deed or the recital, was not evidence of the fact of the issue of the execution.

That presumptions are indulged either in favor of, or in opposition to, ancient deeds, according to the matters *in pais* which accompany them, and that in this case, no possession having been taken thereunder, the natural presumption was that the deed had performed no function, because, from the lack of the execution, it could not rightfully perform any.

That the plaintiff was barred by the statute of limitations, as neither he nor his devisor had, been seized or possessed of the premises within twenty years before the time of the commencement of this action, and as the premises had been held adversely for more than twenty years by Smedes and those claiming under him.

*Seemle*, that assuming the deed to have been valid, and that Smedes' occupation had been that of a tenant at will under the plaintiff, yet as there was no written lease or rent reserved or paid the possession of Smedes, and those claiming under him would have become adverse at the end of twenty years, and the plaintiff's title would be barred by the forty years of their subsequent adverse possession.

APPEAL from a judgment in favor of the plaintiff, entered in Ulster county upon the decision of the court after a trial before the court without a jury.

Wm. Lounsberry, for the appellant.

Howard Chipp, Jr., for the respondent.

LONDON, J. :

The action is ejectment. Both parties claim title under Philip Smedes, who was in possession of the premises in 1810, and continued in possession until his death, about the year 1826.

The plaintiff claims to establish title as follows: He proved the recovery of a judgment by one Swart against Philip Smedes in the Court of Common Pleas of Ulster county, January 19, 1818, for the sum of \$506.72, and eighteen dollars and eighty-three cents costs. He then proved by the deputy county clerk that he had made diligent search for an execution or *feri facias* upon this judgment, and could not find any in the clerk's office. He then read in evidence, over the objection of the defendant, a deed dated October 15, 1818, from Charles Bruyn, sheriff of the county of Ulster, to Abraham Hasbrouck, purporting to convey to him the interest of Philip Smedes in the premises in question. This deed recited the issue to the sheriff of the writ of *feri facias*, commanding him, in the usual form of an execution, to collect for Wm. Swart \$506.72, etc., of etc., Philip Smedes, and that having thereupon seized and sold the premises in question to Abraham Hasbrouck, he therefore now conveys all the interest of Philip Smedes therein to said Hasbrouck. No other evidence was given of the existence or issue of the writ of *feri facias*. The plaintiff next proved that he was the residuary devisee of Abraham Hasbrouck, which devise vested in him whatever title Abraham Hasbrouck had to the premises.

It appeared that Abraham Hasbrouck never took possession of the premises. Philip Smedes continued in possession during his life; upon his death his widow, Margaret, remained in possession until her death, which occurred about 1848. Philip and Margaret had a daughter Maria, who lived with her mother on the premises, and continued in possession until her death in April, 1881. Maria left two children, James and Sarah, and the children of a deceased son,

Andrew. In 1882, James and Sarah conveyed to Sarah Turk, who thereupon brought an action of partition making the children of Andrew Sinedes parties. This resulted in a judgment and sale, under which the defendant, in 1883, obtained the title under which he took and retains' possession.

The court gave judgment for the plaintiff, finding among other things that an execution was duly issued to the sheriff, upon the judgment of 1818, against Philip Smedes. We think this finding cannot be sustained.

The issue of the execution to the sheriff was vital to his power or jurisdiction to sell. He had no power to sell unless he had the execution. (*Jackson v. Hasbrouck*, 12 Johns., 213; *Yates v. St. John*, 12 Wend., 74.) He was a ministerial officer, but, as such, was charged with no power or duty touching these premises with respect to this judgment, except at the instance of William Swart, who, in order to set him in motion and clothe him with power, must first have placed an execution in his hands. The doing of this by Swart would have been strictly a private act, in which the public would have had no concern. Unless the recital of the issue of the execution in the deed is evidence of its issue, there is no evidence, and the deed of 1818 would be worthless, because not shown to be authorized.

It is undoubtedly settled law that the recital, standing alone, unsupported by any evidence of possession under the deed, or recognition by Philip Sinedes of its validity, or other acts *in pais* tending to support the deed or the recital, is not evidence of the fact of the issue of the execution. (*Jackson v. Roberts*, 11 Wend., 425; *Hill v. Draper*, 10 Barb., 454; *Hardenburgh v. Lakin*, 47 N. Y., 109; *Reed v. McCourt*, 41 id., 435; *Williams v. Peyton*, 4 Wheat., 77.)

The learned counsel for the plaintiff cites cases in which it is held that public officers are presumed to have done their duty, and that official acts are presumed to have been regularly and properly performed. (*Hartwell v. Root*, 19 Johns., 345; *Doe v. Phelps*, 9 id., 169; *Ford v. Walsworth*, 19 Wend., 334; *Wood v. Morehouse*, 45 N. Y., 368; *Clute v. Emmerick*, 21 Hun, 122; *Rice v. Davis*, 7 Lans., 393; *Ensign v. McKinney* 80 Hun, 249.) These cases do not aid the plaintiff, for the reason that until it is shown that the sheriff had

an execution, it is not shown that he had any duty to do. The recital in the deed may bind the plaintiff and all persons in privity with him, but with respect to Philip Smedes and the defendant, the recital remains the mere declaration of a stranger, until the authority to make it is produced. The objection to the admission of the deed was that it was irrelevant and immaterial; this objection was made after the evidence of the existence of an execution had been exhausted. The plaintiff could not have produced any further evidence, and hence the objection was sufficient. The search by the county clerk, and his failure to find an execution, standing alone, affords no presumption of its loss. There must, in addition, be some evidence that the execution some time existed. (*Leland v. Cameron*, 31 N. Y., 115; *Mandeville v. Reynolds*, 68 id., 528.) Presumptions are indulged either in favor of, or in opposition to, ancient deeds, according to the matters *in pais* which accompany them. (*Clark v. Owens*, 18 N. Y., 434; *Willson v. Betts*, 4 Den., 212.) If the plaintiff were defending a possession timely taken under the deed of 1818, and since continued, the presumption would be strong that the recital of the issue of the execution was true. We should naturally reason that if it had not been true Philip Smedes would not have surrendered his land, and that the end accomplished resulted from the performance of all the acts necessary to that end. But where there has been no possession, and no other acts indicating any claim under the deed, and the deed recites an execution upon which its validity depends, and no other trace of that execution can be found, we should naturally conclude that the deed had performed no function; because, from the lack of the execution, it could not rightfully perform any. Such a deed under such circumstances, instead of gathering vigor with time, waxes stale.

The omission to take possession may be excused or explained consistently with the right to take it. Here no explanation is offered except that the Smedes were poor colored people. If their long possession was an indulgence granted by Hasbrouck some slight evidence to that effect ought to be given. Philip Smedes was in possession as owner in 1818, the date of the sheriff's deed. Before the deed his possession was adverse to Abraham Hasbrouck; after the deed there is no affirmative evidence that it was changed. The justice finds that he continued to occupy the premises after

the deed as before. After him his widow, his child and his grandchildren, in their turn, succeeded him, down to 1883, sixty-five years after the date of the deed. The twenty years which the law fixes as the limit beyond which it is not usually necessary to preserve evidence of a right actually claimed and exercised have been three times exhausted. They, or the defendant, their grantee, need not prove the origin of their right; the right is presumed because they have held it so long. Besides, the plaintiff is barred by the statute of limitations, neither he nor his devisor having been seized or possessed of the premises within twenty years before the commencement of this action. (Code Civil Pro., § 365.)

Suppose the deed of 1818 to have been valid, then the occupation by Philip Smedes would be deemed to have been under and in subordination to the legal title. (Code Civil Pro., § 368.) Such subordinate possession, in the absence of explanation, will be deemed a tenancy at will. (*Jackson v. Sternbergh*, 1 Johns. Cas., 153; *Russell v. Doty*, 4 Cow., 576; *Jackson v. Graham*, 3 Caines, 188.) There was no written lease and no rent reserved or paid. Peter Smedes and those holding under him would, therefore, be deemed to be such tenants at will for twenty years after the date of the deed of 1818. (Code Civil Pro., § 373; *Whiting v. Edmunds*, 94 N. Y., 314.)

The section last cited, which is a re-enactment of the Revised Statutes, declares that "this presumption shall not be made after the periods prescribed in this section." That is to say, when there is no written lease the tenancy will not be presumed to continue after twenty years from the last payment of rent. It must, therefore, thenceforth be presumed that the former tenant held under a right adverse to his former landlord. Such adverse holding would have been started in 1833, and having been continued for forty-two years, suffices to bar the plaintiff's right of action.

Some evidence was given of the declaration of James Smedes, one of the three heirs-at-law of Maria Smedes, to the effect that the plaintiff owned the premises. Maria Smedes died in April, 1881. James died in August, 1882, and the plaintiff's son, who testified to this declaration, fixes the date of it a year, and possibly two, before James' death. If it was made while Maria was living, it would not be competent to characterize her holding, however it

might characterize his own if made after her death. If force should be given to this declaration, it would affect only one-third of the premises, and the plaintiff has recovered them all.

The judgment should be reversed and a new trial granted, costs to abide the event.

BOCKES, J., concurred.

LEARNED, P. J. :

I think that this action is barred by the statute of limitations. The possession of Philip Smedes was originally adverse to any rights of plaintiff or of his ancestor. And it seems to me that the possession of Philip Smedes and of his successors has continued to be adverse. I concur in the result.

Judgment reversed, new trial granted, costs to abide the event.

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THE NATIONAL BANK OF GRANVILLE, RESPONDENT, v.  
JACOB COHN AND OTHERS, APPELLANTS.

42	381
60	255
42	381
69	148
42	381
23a	615

*Fraudulent assignment—it must be set aside if any part thereof was made with intent to defraud.*

A general assignment, transferring the property of a firm for the purposes of paying the individual debts of the partners, as well as the firm debts, is wholly void as to firm creditors, and must be set aside.

It cannot be sustained, in so far as it transfers the firm property to pay firm debts, and set aside as to that portion which provides for the payment of the individual debts.

APPEAL from a judgment in favor of the plaintiff, entered at the Washington Circuit upon the verdict of a jury, and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

On September 25, 1884, the defendants, Cohn and Stein, brought an action and obtained an attachment against the property of Baldwin & Hull, a firm doing business at Granville, Washington county. The sheriff of that county, to whom the attachment was issued, on September 26, 1884, levied upon property then in the store and constituting, as the defendants claim, the stock in trade

and fixtures of the attachment debtors. Judgment was entered in that action against Baldwin & Hull, on October 21, 1884, for \$422.91, and an execution was on the same day issued to the sheriff, who, by virtue thereof, sold part of the property so levied upon, and applied the proceeds to the satisfaction of the execution. On September 13, 1884, however, an instrument had been executed by the firm by which it transferred its entire stock of goods to the plaintiff to secure the indebtedness and liabilities of the firm, or either of the partners. At the time of this assignment the firm owed the plaintiff \$5,300, and Hull's individual indebtedness to the plaintiff was \$2,473.70. The property so assigned constituted all the assets of Baldwin & Hull. The plaintiff claimed title, under the assignment mentioned, to the property levied upon by the sheriff, and brought this action to recover its value.

*Townsend, Dyett & Einstein*, for the appellant.

*F. W. Betts* and *M. D. Grover*, for the respondents.

LONDON, J. :

I think this judgment should be reversed upon the ground that the assignment was void against the defendants, who are firm creditors, with attachment, judgment and execution. It is conceded that the provision of the assignment transferring the firm property to the plaintiff, in order to secure the individual debts of the members of the firm, cannot be upheld, but it is claimed that the portion of it transferring to plaintiffs the firm property to pay the firm debts, can be. The question is, whether this assignment was made with the intent to hinder or defraud creditors; that is, firm creditors. It was given and received for the purpose, among other things, of applying the firm property to pay the individual debts of the members of the firm. Suppose that expressed purpose is carried out; the effect is both to hinder and defraud such creditors. The effect being known, the intent to accomplish it is just as plain as if it had been confessed in the instrument itself. And to this effect are the cases *Wilson v. Robertson* (21 N. Y., 587); *Barney v. Griffin* (2 id., 365); *Kirby v. Schoonmaker* (3 Barb. Ch., 48); *Fiedler v. Day* (2 Sandf., 594). It can make no difference whether the assignment is to a trustee or to a creditor, or is in the nature of a mortgage. In



either case the purpose declared will, if carried out, enable the plaintiff to hinder and delay the firm creditors in obtaining satisfaction of their debts, and will defraud them to the extent that the firm property is applied to individual debts. In whatever form such an intent is sought to be accomplished, the law condemns it. (*Billings v. Russell*, 101 N. Y., 226.) When it is conceded that that part of this assignment which appropriates the firm property to the payment of individual debts is void against the firm creditors, then it is conceded that by making this assignment the parties to it intended to withdraw some portion of the firm property from the reach of the firm creditors, and consequently the intent was to defraud such creditors to the extent of the firm property thus placed beyond their reach. The statute does not say that the part of the assignment made with such intent shall be void, but that the assignment itself shall be void. The statute condemns the whole instrument if any part of it shows that the instrument itself was made with this prohibited intent. (*Curtis v. Leavitt*, 15 N. Y., 97; *Billings v. Russell*, *supra*.)

Cases like *Darling v. Rogers* (22 Wend., 483), in which the void parts of an assignment are separated from the valid, and the latter upheld, have no application. There particular provisions are forbidden and condemned; here the prohibition is not simply directed to the particular provisions, but to the whole instrument, if made with the prohibited intent, of which these particular provisions are conclusive evidence.

The cases of *Leitch v. Hollister* (4 N. Y., 211); *Dunham v. Whitehead* (21 id., 131), do not aid the plaintiff. They are to the effect that a failing debtor may give to his creditor a mortgage of his property to secure payment of his debt, and such mortgage is not void because providing for the return of the surplus to the debtor after the debt shall be paid. They do not touch the vice in this instrument which we have considered, namely, the intent to appropriate firm property to the payment of individual debts to the prejudice of firm creditors, an intent which is fatal to a mortgage as well as to an assignment.

LEARNED, P. J., concurred.

Judgment reversed, new trial ordered, costs to abide event.

42	384
57	303
42	384
59	206
42	384
70	4

AMBROSE W. ADAMS, AS CONSTABLE, ETC., APPELLANT, v.  
JOHN H. TATOR, RESPONDENT.\*

*Defects in a constable's bond — 1 Revised Statutes, 346, sec. 21,† as amended by chap. 788 of 1872 — until removed the constable's acts are to be treated as those of an officer de jure as to third persons.*

This action was brought by the plaintiff, as constable of the town of Fulton, Schoharie county, to recover the value of certain personal property which he had levied upon and advertised for sale at public auction, by virtue of two executions, issued by a justice of the peace upon two judgments against one George G. King; this property the defendant, claiming the same under a chattel mortgage given to him by King, but not filed until after the levy, took and carried away after the levy and before the sale.

Upon the trial it appeared that the bond filed by the constable upon his election, in February, 1885, complied with the requirements of section 21 of 1 Revised Statutes, 346, but did not contain the provision prescribed by chapter 788 of 1872,† making the person signing the same liable to pay for any damages which might be occasioned by any act or thing done by the constable by virtue of his office.

On January 12, 1886, the day before the trial, the plaintiff executed and filed with the town clerk a new bond, with the same sureties as in the first, which complied with the statute as amended in 1872.

*Held*, that the trial court erred in granting a motion for a nonsuit, made upon the ground that at the time of making the levy the plaintiff was not a constable *de jure*, and, therefore, had no right to bring this action as constable.

That, as the plaintiff had been duly elected, had taken the oath of office and filed the bond required by the statute prior to the amendment of 1872, he was not merely a *de facto* officer, but an officer *de jure*, with a title defeasible only by the action of the people in the nature of a *quo warranto*, or by the action of a justice of the peace declaring a vacancy to exist, and appointing another person to fill it.

That, even if the plaintiff was merely a *de facto* officer, it might be doubted whether the rule preventing such an officer from asserting his title to his own advantage, at the expense or to the injury of another, but holding his acts to be valid, so far as to protect third parties from injury, should be so applied as to deprive the judgment creditor of the lien which attached to the judgment debtor's property upon the delivery of the execution to the *de facto* constable.

\* Decided January 4, 1887.

† The act of 1872 purports to amend section 48 of the Revised Statutes, but the first edition has no section 48. The reference in the amendatory act would appear to be to the fifth edition. [REP.]

APPEAL from a judgment dismissing the complaint, entered upon a nonsuit granted at the Schoharie Circuit.

The plaintiff brought this action as constable of the town of Fulton, Schoharie county, to recover the value of certain personal property which he had levied upon and advertised for sale at public auction, by virtue of two executions issued by a justice of the peace upon two judgments in favor of one Mickle against George G. King; which property the defendant, claiming the same under a chattel mortgage given to him by King, but not filed until after the levy, took and carried away after the levy and before the day of sale. At the close of the plaintiff's testimony the defendant moved for a nonsuit, upon the ground that, at the time of making the levy the plaintiff was not a constable *de jure*, and therefore had no right to bring this action as constable. The court granted the motion. The alleged defect in the plaintiff's title to the office of constable consisted in the fact that the bond filed by him in the town clerk's office, upon his election to the office in February, 1885, omitted the following provision prescribed by chapter 788, Laws of 1872: "And, also, jointly and severally agree and become liable to pay each and every such person for any damages which he may sustain from or by any act or thing done by said constable by virtue of his office of constable." This was an addition to the provisions of 1 Revised Statutes, 346, section 21, which required that the obligors should "jointly and severally agree to pay to each and every person who may be entitled thereto, all such sums of money as the said constable may become liable to pay on account of any execution which shall be delivered to him for collection." The bond given by the constable conformed to the provisions of the Revised Statutes before the amendment of 1872. On January 12, 1886, the day before the trial, the plaintiff executed and filed with the town clerk a new bond, with the same sureties as in the first bond, in conformity with the statute as amended in 1872. The plaintiff apparently made a *prima facie* case in other respects, and the nonsuit was granted.

*S. L. Mayham*, for the appellant.

*W. C. Lamont*, for the respondent.

LONDON, J. :

The plaintiff was duly elected, took the oath of office, filed such a bond as the statute required before the amendment of 1872, but omitting the additional clause prescribed by that amendment, and in good faith entered upon the discharge of his duties. This bond was good to the extent of its provisions. (*People ex rel. Comstock v. Lucas*, 93 N. Y., 585.) The plaintiff, therefore, was not merely a *de facto* officer, but an officer *de jure*, with a title defeasible, only upon the action of the people in the nature of a *quo warranto*, (*Foot v. Stiles*, 57 N. Y., 399; *People ex rel. Woods v. Crissey*, 91 N. Y., 635). or upon the justice of the peace declaring a vacancy and appointing another to fill it. (*Horton v. Parsons*, 37 Hun, 42.)

The statute (1 R. S. [5th ed.], m. p. 346, § 46 [24], says the neglect by a person chosen constable to give the prescribed bond within the time limited for that purpose, (eight days after he shall be notified of his election), shall be deemed a refusal to serve. This is not a self-executing *vacatur* of the office. If no bond at all is filed, the justices of the peace, in whom the power to fill a vacancy in this office is vested (1 R. S. [5th ed.], m. p. 348, § 61 [36], may, no doubt, exercise the function of deeming the neglect to file a bond the refusal to serve, and then proceed to fill the vacancy. But the time in which the constable shall file a bond is merely directory. (*Dutton v. Kelsey*, 2 Wend., 615.) And if the constable file it in good faith after the time prescribed, and before the justices have declared the vacancy, it follows that he will make good his title. (*People ex rel. Williamson v. McKinney*, 52 N. Y., 374.)

In this case, the constable having filed a bond which contained some, but not all, of the provisions of the statute, could not, in fairness, be deemed by the justices to have refused to serve, especially when they knew he was serving, without giving him an opportunity to file a perfect bond. But grant that they had the power to do it, and we must grant it, still they did not declare the office vacant, and hence the plaintiff was not ousted. He was not an usurper like an alien, or a woman or a minor, who are declared ineligible, and who, therefore, may not assume to hold the office, for lack of legal capacity to be able to fill it. He was eligible; he had been chosen; he simply followed the old form instead of the new in preparing his bond;

he was the rightful officer with a flaw in his title, which might or might not oust him, and which nobody except the people, by their justices of the peace, or attorney general, had any authority to urge, or act upon, to his downfall.

On the day before the trial, the plaintiff executed and filed a new bond, with sureties, in the form prescribed by the statute. We do not think it was necessary for him to do this in order to maintain this action, but if the foregoing views are correct, this new bond cured the defect in his title, and a *quo warranto* could not then oust him. But the bond does not confer title; it only enables the officer to keep it. If the plaintiff acquired title by the election in February, 1885, and then took the oath of office and entered upon its duties, and when the trial took place, his title was indefeasible, in the absence of any statute forbidding his levying an execution without first filing his bond, it is difficult to see upon what ground it could be held he had no title to the office in the meantime.

The general rule with respect to *de facto* officers is, that the office is so far void as to prevent the officer from asserting it to his own advantage at the expense or to the injury of another, but is valid so far as to protect third parties from injury; in other words, void as to himself, but valid as to strangers. (*People ex rel. Hopson v. Hopson*, 1 Denio, 574; *Weeks v. Ellis*, 2 Barb., 320; *Matter of Kendall*, 85 N. Y., 302.)

If the plaintiff was merely a *de facto* officer, it may be doubted whether this rule should be so applied as to deprive Mickle, the judgment creditor, of the lien which attached to the judgment debtor's property upon the delivery of the executions to the *de facto* constable. (Code Civil Pro., § 1405.) That lien could only be made available by means of levy and sale. The constable was the official agent, through whom Mickle must realize upon his lien. (*People ex rel. Comstock v. Lucas*, 93 N. Y., 538.) The defendant had a chattel mortgage upon the same property, but he did not file it until after the execution was delivered to the constable, and therefore his lien was subsequent to Mickle's. (*Hathaway v. Howell*, 54 N. Y., 97.) The defendant, when he seized and carried away the property, did so without right. But, if by interposing the defect in the constable's title, he can compel an abandonment of the levy, he can

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THIRD DEPARTMENT, NOVEMBER TERM, 1886.

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thus displace the lien of the execution and obtain for his chattel mortgage priority of lien over any subsequent execution or levy. Besides, the goods of the execution debtor having been taken from him upon the execution, he has the right to insist that they shall be applied in satisfaction of it. (*Peck v. Tiffany*, 2 N. Y., 456.)

The rule that the acts of a *de facto* officer are valid as to strangers, ought to be so applied as to prevent this loss to Mickle. It may be that he would have his action for his loss against the constable, but the difference between a right of action against the constable, and the goods in the hands of the constable upon the execution, may be the difference between losing his claim and collecting it. The action against the defendant is brought by the constable. His right of action is founded upon the special property acquired by virtue of the levy. (*Barker v. Binninger*, 14 N. Y., 280.) But as was said in *Howland v. Willetts* (9 N. Y., 174), "the sheriff acts for and in behalf of the plaintiff in the execution, and that the plaintiff is the substantial party, the one immediately and directly interested in the levy and the property or money acquired by virtue thereof." (*Root v. Wagner*, 30 N. Y., 9.) The rule that the *de facto* officer's acts are valid as to third parties, ought, it seems, to be so applied as to be valid against a third party's wrong, when that wrong is employed to defeat the execution creditor's substantial right of property.

The judgment should be reversed and a new trial granted, costs to abide the event.

LEARNED, P. J., and BOCKES, J., concurred.

Judgment reversed, new trial granted, costs to abide event.

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CECILIA G. M. PRESTON AND OTHERS, APPELLANTS, v.  
ELMER E. PALMER AND OTHERS, RESPONDENTS.\*

*Will* — the right of a devisee to take thereunder is not affected by the fact that he willfully murdered the testator.

This action was brought to have the will of one Francis B. Palmer, so far as it devised and bequeathed property to the defendant, Elmer E. Palmer, declared

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\* Decided January 4, 1887.

void, upon the ground that Elmer E. Palmer willfully murdered the testator in order that he might prevent a revocation of the will and have the immediate enjoyment of the property. It was conceded upon the trial that Francis died of strychnine poison, and that Elmer had been convicted of murder in the second degree for killing him, and been sentenced to the Elmira State Reformatory therefor, where he was then imprisoned.

*Held*, that under the laws of this State Elmer was entitled to take the property devised and bequeathed to him by the will of his grandfather, although he himself willfully murdered him.

APPEAL from a judgment in favor of the defendants, entered in St. Lawrence county upon the report of a referee.

The object of the action was to have the will of Francis B. Palmer, so far as it devised and bequeathed property to the defendant, Elmer E. Palmer, declared void, upon the ground that Elmer E. Palmer willfully murdered the testator, in order that he might prevent a revocation of the will, and have the immediate enjoyment of the property. The case was referred to the Hon. W. H. Sawyer, who found the following facts: For many years prior to April 25, 1882, Francis B. Palmer was the owner of the real property described in the complaint (a farm of about 130 acres), and a large amount of personal property. April 25, 1882, he died of strychnine poison, willfully administered to him by the defendant Elmer Palmer, with the intent and for the purpose of producing his death. Francis made his will in 1880. It gives his two daughters, the plaintiffs, fifty dollars each, and the residue to his grandson Elmer. Elmer was aware of the provisions made for his benefit by his grandfather's will, and was desirous of entering into immediate possession of the property, and administered the poison with that intent. The testator had expressed disapproval of Elmer's conduct, and presumably would have altered his will had he known or suspected Elmer's murderous intent. The farm and personal property was worth about \$5,500, and Elmer had no property of any considerable amount. The deceased left no descendants except his two daughters, the plaintiffs, and the grandson Elmer, a boy about twenty years old, who is unmarried, and had lived in the family of his grandfather for a long time.

The will has been probated and the administrator, with the will annexed, is acting thereunder and in possession of the property, and, unless enjoined, purposes giving Elmer the enjoyment of the

real and personal estate. It was conceded on the trial that Francis died of the strychnine poison. It was further conceded that Elmer was convicted at the St. Lawrence Oyer and Terminer of murder in the second degree for the killing of Francis by strychnine poison and was sentenced to the Elmira State Reformatory therefor, where he has since been and now is imprisoned. The tenant and widow are in default. The referee deduced, as conclusions of law, from these facts the following: That in this State the transmission of property by will and its descent are creations of statute, and governed thereby; that nothing remains to courts but to enforce the statutes as they are, the old maxims of the common law being overridden thereby; that no exception exists under the statute to the right to take by will on account of crime; that, though Elmer wickedly and maliciously compassed the death of the testator, he is still entitled, under the statutes, to take under his will and enjoy the fruits of his crime. To a request to find that the motive of Elmer in murdering Francis was to obtain the speedy enjoyment of the property, and to prevent the revocation by Francis of the provisions of the will beneficial to him, the referee responded; "I so find substantially." He refused to find, as a conclusion of law, that Elmer had no right to terminate the enjoyment by Francis of his property, or prevent the revocation of the will. He further refused to find that Elmer is estopped from claiming the benefits of the will, a possible revocation of which he prevented by his crime.

*Leslie W. Russell* and *C. E. Sandford*, for the appellants.

*W. M. Hawkins*, for the respondents.

LONDON, J. :

We concur in the conclusions of law found by the learned referee. Elmer E. Palmer is permitted by our law to take the property devised and bequeathed to him by the will of his grandfather, although he himself willfully murdered him.

The civil law, and the law in those countries which derive their jurisprudence from it, as we are instructed by the diligence of counsel, holds otherwise. (Domat Civil Law, part 2, book 1, tit. 1, § 3; Pothier on Successions, chap. 1, § 2, art. 4, § 2; Poullier, vol. 4, p. 113; Duranton, vol. 6, p. 111; Marcade, vol. 3, p. 42; Spanish Partidas, 994.)



The Civil Code of Lower Canada (sec. 610) copying from Code Napoleon (sec. 727), reads as follows: "The following persons are unworthy of inheriting, and, as such, are excluded from successions: 1. He who has been convicted of killing or attempting to kill the deceased."

Section 893, substantially like sections 955, 1046, Code Napoleon: "The revocation of a will may be demanded: 1. On the ground of the complicity of the legatee in the death of the testator."

It is manifest that we have omitted in our State to provide for the like contingency.

We are cited to the case of *The New York Mutual Life Insurance Company v. Armstrong* (117 U. S., 591), in which it was held that the beneficiary and owner of a policy of life insurance, by murdering the insured, forfeited all rights under it. The court said: "As well might he recover insurance money upon a building that he had willfully fired." That was a case of contract; it certainly could not be held that the company had promised to pay the insurance money to the murderer of the person whose life is insured. Such a contract would be so unreasonable and against public policy, that the courts could well hold that the minds of the contracting parties had never met upon such a proposition, and if they had, the contract would be void.

But a will is not a contract. It is the designation in the forms prescribed by statute, by the testator, of the persons who shall enjoy his property after he is dead. The law has pronounced its sentence upon this murderer, and that sentence does not embrace incapacity to take under this will. If, as we do not think, he is, by virtue of the sentence, civilly dead, he did not become so until sentenced, and the sentence did not relate back to the testator's death, and therefore could not affect any question at issue here. Perhaps this case will suggest to the law makers the imposition of such incapacity in like cases. But as it has not been imposed by the legislature, we cannot declare it.

The judgment is affirmed, with costs.

LEARNED, P. J., BOOKER, J., concurred.

Judgment affirmed, with costs.

## RUTSEN HUNT, APPELLANT, v. CHARLES A. VAN DEUSEN, RESPONDENT.\*

*Representations on a sale of chattels — when they constitute a warranty, which survives the acceptance of the goods — a rule of damages will be followed notwithstanding proof that the vendee sustained none.*

The defendant accepted an offer of the plaintiff to butcher fifteen hogs, owned by him, and sell the pork to the defendant, upon the statement of the plaintiff that there were not any stags, coarse or unmerchantable hogs among them, and that they were a choice, first-class lot. It was proved upon the trial that upon an examination of the dressed hogs, which were delivered during the defendant's absence from his store, it was found that one of them, weighing 394 pounds, was, when butchered, a hog from which only one testicle had been taken in castration, the other not being found, and that the pork of such an animal was not merchantable and was of little value.

*Held*, that the representations upon which the defendant agreed to buy the pork were a warranty of quality, and that there was a breach thereof, which was not waived by the acceptance of the pork, and which entitled the defendant to recover, as damages, the difference in value between the pork as it was and such pork as it was represented to be.

That it was error to compel the defendant, who made the pork into sausages and lard, to answer that he sold the sausages and lard at the ordinary price, as the plaintiff could not, because of the dexterity of the vendee, escape from the damages as measured by the rule above stated.

That it was not competent for the plaintiff to prove, by several witnesses, that each of them had had a hog of this description, and how he treated it, and that he did not discover that the pork differed from his other pork.

APPEAL from a judgment by the County Court of Columbia county, reversing a judgment of a justice of the peace in favor of the plaintiff.

The plaintiff had fifteen live hogs, and offered to butcher them and sell the pork to the defendant. The defendant asked if there were any stags, coarse or unmerchantable hogs among them; he said no, they were all a choice first-class lot. The plaintiff agreed to buy the pork at seven dollars per hundred. Some time afterwards the plaintiff delivered the dressed hogs at the store of the defendant during his absence. Upon examination, one of them, of 394 pounds weight, was found to be very coarse. It was proved

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\* Decided January 4, 1887.

on the trial that it was, when butchered, a hog from which only one testicle had been taken in castration, the other not being found. Evidence was given tending to show that the pork of such an animal was not merchantable and was of little value. The plaintiff had judgment for the price of the pork, which judgment was reversed by the County Court, and the plaintiff appeals.

*Newkirk & Chase*, for the appellant.

*Harver & Cochrane*, for the respondent.

LANDON, J. :

The representations upon which the defendant agreed to buy the pork were a warranty of quality. There was a substantial breach of that warranty, that was not waived by the acceptance of the pork. (*Brigg v. Hilton*, 99 N. Y., 517.) The plaintiff cites *Gilbert Car Company v. Mann* (24 W. Dig., 483), decided by us. We held in that case that the car which the plaintiffs manufactured and delivered under an executory contract, containing a warranty as to quality, was accepted under such circumstances as precluded the defendant from insisting upon the warranty. The defendant in that case, notwithstanding the warning of the plaintiff, insisted upon the use of green wood, which caused the defect. The defendant here did nothing to waive his right to rely upon the warranty.

The measure of damages was the difference in value between the pork as it was, and such pork as it was represented to be. The defendant made the pork into sausages and lard. He was required to answer, notwithstanding his objection, that he sold the sausage and lard at the ordinary price. The object of this was to show that by his methods he protected himself from actual loss. But that fact does not avail the vendor. He must respond according to the terms of the contract, and cannot, because of the dexterity of the vendee, escape from the damages measured by the rule above stated. (*Muller v. Eno*, 14 N. Y., 597.) It was not competent for the plaintiff to prove, as he did by several witnesses, that each one of them had had a hog of this description, and how he treated it, and that he did not discover that the pork differed from his other pork. The defendant could not be prepared to meet these individual cases,

but only to establish the general fact in such cases, and the particular fact in this case.

The judgment should be affirmed, with costs.

LEARNED, P. J. and BOOKES, J., concurred.

Judgment of county court affirmed, with costs.

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CARL VOIGT AND OTHERS, RESPONDENTS, v. MARTHA  
BROWN, APPELLANT.

*Liability of a married woman on a note — when determined by the laws of the State where the contract is made, and not by those of the State in which payment is to be made.*

The husband of the defendant, both of whom were domiciled in this State, went into Connecticut and there, as authorized by her, signed her name to an accommodation note, dated and payable in Connecticut, to the order of a firm of which he was a partner. He took the note to New York, procured it to be discounted by the plaintiffs, and received the proceeds thereof.

Held, that as the note had no inception until it was delivered to the plaintiffs, the contract was made in the State of New York, and was governed by its laws and not by those of Connecticut, and that the defendant was liable upon the note, although she would not have been so had the contract been made in Connecticut.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action at the Washington Circuit, by the court without a jury.

*Griswold & Cornell*, for the appellant.

*Carter, Hornblower & Byrne*, for the respondents.

LEARNED, P. J. :

The defendant and her husband were domiciled in the State of New York. He went into Connecticut and there signed her name to an accommodation note, dated and payable in Connecticut to the order of a firm of which he was a partner. He was authorized by her to do so. He took the note to New York and there had it discounted by plaintiffs, and he received the money. The question is whether she is liable. The laws of Connecticut do not authorize

a married woman to contract except for the benefit of herself, her family or her separate or joint estate.

The note had no inception until it was delivered to plaintiffs. The contract was therefore made in New York. Hence we may eliminate from the case the fact that the note was written in Connecticut. That is of no more consequence than the place where the paper was manufactured. As defendant's husband was her agent to make the note, and was also one of the firm of payees, his possession of the note was not a transfer to the payees. The note remained in his possession, as her agent, until its delivery in New York to the plaintiffs. The case is the same, therefore, as if she had delivered the note in New York, either to the plaintiffs or to the payees, to be forthwith negotiated.

The question is one simply of defendant's capacity. It is not a question as to any construction of the contract, such as rate of interest, days of grace, mode of presentment, and the like. And when reduced to its simplest statement the question is whether a married woman, domiciled in New York, has capacity to make a contract in New York which is to be performed in a State where a married woman has not power to make such a contract.

We do not see how the place of performance in any way affects the capacity to contract. The law of the place of performance does not forbid her to perform, and, even if it did, that might not affect her capacity. Certainly, when the law of this State says that a married woman may make a contract, neither her privilege to contract, nor the rights of those with whom she contracts, are to be taken away by the law of another State.

These views are sustained by authority. Thus Huberus, *Prælect* (2 l., I. tit. 3, § 5, *De Conflictu Legum*: "*Proinde contractus celebrati secundum jus loci, in quo contrahuntur, ubique tam in jure quam extra judicium etiam ubi hoc modo celebrati non valent sustinentur.*"

And again, section 12, he says: "*Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari. cum hoc effectu, ut ubivis locorum eo jure, quo tales personæ alibi gaudent vel subjecti sunt, fruuntur et subjiciantur.*" And this he illustrates by saying that in some provinces those who are over twenty are considered to have reached majority, and that they

can alienate immovables even in those places where no one is considered to have reached his majority until he is twenty-five. This rule would, for the ends of justice, hold a married woman domiciled in this State, liable upon a contract made by her in a State by the laws of which she had not capacity to contract.

The same doctrine is laid down by STORY, J. (Conflict of Laws, § 66, *et seq.*), and by KENT, J. (2 Comm., 458), viz: That the general capacity of parties to contract depends as a general rule upon the law of the place of contract. It is true, however, that Huberus says, section 10: "*Verum tamen non ita præcise respiciendus est locus, in quo contractus est initus, ut si partes alium in contrahendo locum respuerint, ille non potius sit considerandus.*" But that remark does not have reference to the capacity of the parties, as the illustration shows which he gives. That is, that where residents of Friesland marry wives in Holland and take them at once to Friesland, the law of Friesland governs as to community of property between husband and wife. There has been some discussion in books and authorities, whether the place of domicile or the place of contract should prevail in determining the capacity of the contracting party. See *Milliken v. Pratt* (125 Mass., 374) for a discussion of this matter; where the validity of the contract was sustained on the ground that it was valid where it was made. (*Scudder v. Union Nat. Bk.*, 91 U. S., 406; Foote's Inter. Law, p. 31; 2 Kent's Comm., 458; Wharton Conf. L., § 114.) But that is a question which we need not decide. Both domicile and place of contract were in New York. We may also cite in support of the views above expressed *Bell v. Packard* (69 Maine, 105); *Hill v. Pine River Bank* (45 N. H., 300).

The judgment should be affirmed, with costs.

BOOKES, J., concurred.

LANDON, J.:

I concur. The defendant had the capacity to make this contract in New York, where she made it. She had the capacity to perform it in Connecticut, the place of performance. The law of the latter State, in denying to her the capacity to make the contract in that State, did not deprive her of the capacity of performing it there.

As she competently made a contract, which it was competent for her to perform, there can be no legal excuse for nonperformance.

As our courts have acquired, in this action, jurisdiction both of the person and of the subject-matter, there seems no good reason why they should not afford redress, and overrule the hypothetical and irrelevant defense, namely, that if this contract had been made in Connecticut, it could not have been enforced.

Judgment affirmed, with costs.

# MEMORANDA

OF

## CASES NOT REPORTED IN FULL.

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ANNIE M. HOLCOMB, RESPONDENT, v. EMMA D. CAMPBELL, APPELLANT.

*Evidence — when acts and declarations of a former owner of a mortgage are admitted as a part of the res gestas to prove its payment.*

APPEAL by the defendant, from a judgment against her, entered in Rensselaer county upon the report of a referee, adjudging the mortgage, as to which the controversy arose between the parties, to have been satisfied and discharged by the payment of the mortgage debt.

The mortgage was made by the plaintiff and her husband, to Henry and Ephraim Alderman, in April, 1869, and was by them assigned, together with the bond to which it was collateral, to the defendant, July 19, 1884. The plaintiff claimed that the mortgage debt had been fully paid to the mortgagees prior to the assignment to the defendant, and, as evidence bearing on the subject of such payment, the plaintiff was allowed, against objection and exception, to testify to what were called accountings and settlements between her husband, the mortgagor, and the Aldermans, the mortgagees. She testified that she knew of more than one; that she thought there was one in April, 1874, and several others; either that year or the next year; that Ephraim was the one with whom the business was principally done. She then testified as follows: "There was a general looking over of accounts and bills on several occasions; the first looking over was September 1, 1874; \$349.50 was found due my husband, to be indorsed on bond and mortgage; second interview was in April, 1875, \$300; third interview, August, 1875, \$20 and \$35; September, 1876, \$130.20; all due my husband from Aldermans; I recollect the transactions of April, 1874; the sum then agreed upon was \$300."

The court, at General Term, after holding that the findings of fact of the referee were sustained by the evidence, said: "The



principal ground of error, as respects the admission of this evidence is, that it was but an admission of a former holder of the mortgage, and was inadmissible to affect the rights of the present plaintiff, who thereafter became the assignee, for value, of the security. It should be observed, however, that the transactions spoken of occurred while the relation of the parties was that of debtor and creditor, and related to matters involving that relation. As a transaction relating to and affecting those matters it was admissible, as would be evidence of a money payment by one to the other, had it been made. The evidence was much more in its significance than a mere admission by a former holder of the security, of an existing fact, unaccompanied by any act or transaction between the parties. It proved, if credited, a transaction, the looking over of accounts, adjusting the items, with an agreement between the parties, or, perhaps, a prior understanding between them during the running of the account, as to the application of the balance settled upon, or to be settled upon, by them; and this, as above suggested, at a time when their relation of debtor and creditor remained unaffected by any assignment of any claim or demand then within the scope of their action. It may be well assumed that as yet, that is, until the parties had ascertained the balance in each instance there had been no application of it, but when found by them it was to go in payment of the mortgage. The transaction would be an accord and satisfaction as to the account in each instance of looking over, on an application upon the mortgage of the balance found, as was understood and agreed should be done; and under such circumstances the agreement to make the application would be as effectual by way of payment upon the mortgage as if receipted to that effect or indorsed thereon. In either case the fact of payment would exist, the difference being only the evidence of the fact. Both parties would be concluded by the transaction; the mortgagor from further claim upon the matters of the account, and the mortgagees from denying the payment upon the mortgage as agreed. (*Davis v. Spencer*, 24 N. Y., 391.) The case is covered by the doctrine laid down in *Smith v. Schanck* (18 Barb., 344), where it was said in effect, that any agreement between the creditor and the debtor, upon which the latter acted, thereby constituting an agreement entitling him to claim a deduction from the demand

by way of payment or set-off before transfer of it, might be proved; that an agreement is an act done, and thereby differs from a simple declaration, and is provable in like manner as a payment in money or property would be.

"And it follows that what was said by the parties while the settlement was in progress was admissible as part of the *res gestæ*. In the view here taken of the case, the authorities cited by the counsel for the appellant on this branch of it have no application. The transaction testified to, if credited, constituted, both in equity and law, payments upon the mortgage, and they were open to proof as such, the same as would be a payment in money or in property. So, too, payment of a bond may be established by parol proof. See also, as bearing on this case, *Prouty v. Price* (50 Barb., 344). We think the evidence above considered was properly admitted."

*R. E. Andrews*, for the appellant.

*James Lansing*, for the respondent.

Opinions by BOOKES, J., and LANDON, J.; LEARNED, P. J., not voting.

Judgment affirmed, with costs.

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ADAM YAGER, APPELLANT, v. CHARLES PERSON,  
RESPONDENT.

*Witness — what questions may be asked for the purpose of discrediting him.*

APPEAL from a judgment in favor of the defendant, entered upon the verdict of a jury at the Greene Circuit.

The action was brought to recover damages alleged to have been sustained from an assault and battery committed upon the plaintiff by the defendant.

The court, at General Term, said: "It is settled that it is not competent to inquire into charges and accusations, or even indictments, for the purpose of discrediting a witness, because 'they are consistent with innocence, and may exist without moral delinquency.' (*People v. Irving*, 95 N. Y., 544.) It is, however,

competent to inquire of a witness as to his past conduct. (*People v. Casey*, 72 id., 394.)

"Under which of these two heads of inquiry did the questions in this case come? Plaintiff, on cross-examination, was asked: 'Have you been sued for assault and battery? A. Yes. Who sued you? A man by the name of Brick. Did he obtain a verdict against you? I believe he did. Did you have any trouble with Jeremiah Plank? A little trouble; he did not build the lime kiln as he agreed. Did you have any trouble with William Olliver? No, sir; no more than a little wood that I had sold him, and he did not cord it right.

"Now, whether plaintiff had been sued for assault and battery was immaterial. Even a judgment against him was not a conviction of a crime. The inquiry made was not as to the plaintiff's having committed an assault, as in *People v. Casey* (*ut supra*). The defendant admits that the question as to being sued was improper, but claims that it was afterwards justified by the fact that Brick recovered, which recovery, defendant says, established the fact of the assault. But we think that it is stated in *Real v. People* (42 N. Y., 271) the inquiry should be as to specific acts of the witness, and not as to the success of litigations against him. Of course a conviction of a crime stands on a different ground.

"The other questions, respecting trouble with Plank and Oliver, the defendant justifies on the ground that by inference they referred to assaults. They were not so expressed, and they were not so answered. There was an affray between these parties, and contradictory evidence in respect to it. Each of the parties testified and gave different versions of the affair. It may have influenced the jury to have evidence that plaintiff had been sued for assault and battery, and had had trouble with two or three persons. We think these errors cannot be disregarded.

"Judgment reversed, new trial granted, costs to abide event."

A. C. Griswold, for the appellant.

Frank H. Osborn, for the respondent.

Opinion by LEARNED, P. J.; BOOKES and LONDON, JJ., concurred.

Judgment and order reversed, new trial granted, costs to abide event.

**Cases**  
DETERMINED IN THE  
**SECOND DEPARTMENT,**  
AT  
GENERAL TERM,  
**December, 1886.**

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CAROLINE C. BLATZ, RESPONDENT, v. JACOB ROHRBACH,  
APPELLANT.

*Civil damage act — what evidence will support a verdict that a suicide resulted from intoxication.*

Upon the trial of this action, brought under the civil damage act to recover damages sustained by reason of the plaintiff's husband having committed suicide while intoxicated, evidence was given tending to show that after playing cards and drinking in the defendant's saloon he arrived at home at about twenty minutes to eleven, very much intoxicated; that the plaintiff, after attempting to quiet him, took her baby and went up stairs, leaving her husband below, it not being an unusual thing for him to sleep down stairs. In the morning he was found hanging by the side of the closet door, having evidently committed suicide. The deceased was the father of ten children, the youngest but a few weeks old. He was addicted to strong drink, but made a comfortable living for his family. He had formerly attempted suicide, but whether or not, at the time of making such attempt, he was sober or otherwise did not appear. A paper was found containing the words "give my watch to my boy," and stating that his brother-in-law owed him fifty-seven dollars.

*Held*, that a verdict finding that the suicide was the result of the intoxication would not be set aside by the appellate court.

APPEAL from a judgment in favor of the plaintiff for \$3,216.82, entered upon the verdict of a jury at Westchester Circuit, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

*Samuel G. Adams and John S. Graber, for the appellant.*

*Charles H. Noxon, for the respondent.*

BARNARD, P. J. :

The plaintiff's husband arrived at his home in Mt. Vernon, on the 4th of March, 1885, at about twenty minutes to eleven, P. M. His wife, the plaintiff, tried to quiet him, as she testifies he was very much intoxicated. She failed to do so, and in about an hour after he came home the plaintiff took her baby and went up stairs to bed, leaving her husband below. It was not an unusual thing for the husband to sleep down stairs. In the morning he was found hanging by the side of the closet door, having evidently committed suicide. The plaintiff brings this action against the defendant under chapter 646, Laws of 1873, known as the civil damage act. She gave proof tending to show that the defendant sold or gave away some two or three glasses of beer to her husband on the night in question. A very sharp contradiction is made as to the condition of the husband when he left the saloon of the defendant; but in view of the fact that the husband arrived at the saloon at half-past seven, P. M., and played cards there, when the result, in some friendly way, entitled the players to drink, and in view of the fact that the habits of the husband were bad, the issue upon the intoxication was well found in favor of the intoxicated condition of the husband by reason of liquor, whether beer or other drink, sold to him by the defendant. Added to this, both the plaintiff and her daughter were explicit in their statements as to an extreme condition of intoxication of the deceased husband and father. Did this state of intoxication induce the suicide? The question cannot ordinarily have any direct proof. It must be inferred, and the case proven is that he was the father of ten children, the youngest but a few weeks old. He was addicted to strong drink, "but made a comfortable living" for this large and helpless family, as only two earned their own board. He had formerly attempted suicide, but whether or not he was then sober or otherwise does not appear. There was found, after the suicide, a paper containing the words, "give my watch to the boy," and that his brother-in-law, one Johnson, owed him fifty-seven dollars. This is the case, and the jury have found the suicide the result of the intoxication produced by the

defendant. An appellate court cannot properly set aside the verdict. (*Neu v. McKechnie*, 95 N. Y., 632.)

There was no proof of insanity, and it was unnatural and, therefore, unusual for a father, with an undisturbed brain, to deliberately leave a wife and so many helpless children behind him, under the circumstances surrounding the suicide. The jury were told that to justify a verdict they must find that the intoxication was to such an extent as to deprive the deceased of the natural use of his faculties and to render him incapable of caring for himself, and that was to be proven and not derived from speculative opinion, and that the intoxication caused the act. The damages are not excessive. There was proof tending to show a request to the defendant's wife, while in charge of the bar, not to sell any more strong drink to the deceased husband of plaintiff. This notice was given by plaintiff, and every circumstance stated which should have been heeded.

The judgement should therefore be affirmed, with costs.

PRATT, J., concurred.

Judgment and order denying new trial affirmed, with costs.

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CLARA R. ATKINSON, RESPONDENT, v. JOHN A. BOWMAN,  
APPELLANT.

*Grant of lands by the crown — construction of it — the town of East Hampton took title under the grant from the crown.*

The tract of land which now constitutes the town of East Hampton was granted by the crown to the town and not to the persons called the "proprietors," who had bought the tract from the Indians, and a valid title to any land therein must be derived from the town and not from the said "proprietors."

APPEAL from a judgment in favor of the plaintiff, entered in Suffolk county upon the report of a referee.

The action was brought to recover the possession of a lot of upland in the town of East Hampton, Suffolk county. The plaintiff claimed title from the original proprietors, their heirs and assigns, and the defendant claimed title under a quit-claim deed from the trustees of the town of East Hampton.

The referee found that the native Indian proprietors of the tract of land, which is now the town of East Hampton, in the year 1648, by deed, conveyed to Theophilus Eaton and Edward Hopkins and their associates the said tract. In 1651, Eaton and Hopkins conveyed the said tract of land to thirty-nine individuals called proprietors. These proprietors obtained a confirmation of their purchase by a patent from Richard Nicholls, Esq., "Governor General under his Royal Highness, James, Duke of York," bearing date March 13, 1666, recorded in the records for the county of Suffolk.

Another patent, dated the 9th day of December, 1686, was issued by Thomas Dongan, "Captain General, Governor in Chief and Vice Admiral of the Province of New York, and its dependences, under his Majesty, James ye Second, by the Grace of God, of England, Scotland, France and Ireland, King, defender of the faith," etc., confirming the former grant or patent of Richard Nicholls, and confirming the title of the proprietors, not only to that portion of the lands purchased by them of the native Indians that had theretofore been allotted and divided between them, but confirming, also, their title to all of such tract or tracts of land of the original Indian purchase that remained common and undivided, to wit, "and as for and concerning all and every such parcel or parcels, tract or tracts of lands remaining of the granted premises not yet taken up or appropriated to any particular person or persons, by virtue of the before recited deed or patent, to the use, benefit and behoof of such as have been purchasers thereof, and their heirs and assigns, forever, in proportion to their several and respective purchases thereof made as tenants in common," etc. (See Dongan Patent, recorded in the secretary's office, Liber No. 2, Book of Patents, begun 1686.)

The said purchasers or proprietors of the land so purchased of the native Indian proprietors, and allowed and confirmed by patents as aforesaid from the colonial governors, with their heirs and assigns, thereafter made various allotments and divisions between them of such common and undivided lands belonging to them, and used and enjoyed the same, not as public property belonging to the town of East Hampton, or as corporate property, but as property belonging to them individually, as tenants in common, in shares or rights ascertained according to the amount paid by or on behalf of each

purchaser. The said purchasers or proprietors paid the consideration for the original conveyance of said tract of land and for the patents, and also the quit-rent.

The said proprietors exercised jurisdiction and acts of ownership over such common lands from the date of purchase and confirmation by patent, and from time to time directed and authorized the sale, lease, exchange and use of different parcels of said lands.

The original trustees of the town were themselves of the original purchasers or proprietors. They occasionally acted for the proprietors, when authorized and directed so to do, by resolution of the proprietors at their meetings, with reference to the use of the common and undivided lands, and kept an account with the proprietors.

The term "thirteen acres of commonage" means one full share. The undivided lands were originally put into forty-seven shares or lots. Each lot or share consisted of "thirteen acres of commonage," not in actual size, but that was simply the unit of value. The proportion that each proprietor had in the first division or allotment of land was the basis for all future divisions, and determined the proportion of each proprietor for himself, his heirs or assigns, in all future divisions or allotments of the remaining common lands. These lands were not all divided or allotted at one division. There were many divisions. The proprietors met and determined, from time to time, how many acres of the still undivided land should be allotted, and then the allotment was made by committees or surveyors, or other agents of the proprietors, and each proprietor was allotted his share according to his original right or proportion. A few parcels or tracts of such common lands remained unallotted or undivided after the last allotment was made by the proprietors, their heirs and assigns.

The premises described in the complaint are a part of such common lands that have never been allotted or divided. Said land in question is wild, uncultivated, unimproved, and until recently uninclosed, and not until recently in the occupation of any particular person. The defendant, before the commencement of this action, took exclusive possession of, and has occupied, and still occupies, the same, to the exclusion of the plaintiff, under a claim of title from the trustees of the town. The plaintiff has demanded possession, which the defendant has refused.



*Edward M. Atkinson*, for the appellant.

*Henry C. Platt*, for the respondent.

BAERNARD, P. J.:

The facts in this case are undisputed. Eaton & Hopkins bought a tract of land, in 1651, of the Indians. This tract is now the town of East Hampton. James, Duke of York, owned the entire island, by grant from King Charles, second. The governor-general, Nichols, under James, Duke of York, ratified the purchase. This patent recites that the town is in possession of "several freeholders and inhabitants," who have purchased the land, and confirms the purchase unto the purchasers to a justice of the peace and six others, named "as patentees for and in behalf of themselves and their associates, the freeholders and inhabitants of the said town, their heirs, successors and assigns."

By the same charter the "said patentees and their associates" were granted "all the privileges belonging to a town within the government." The patent or charter of Nicholls was given in 1666, and in 1686 Captain-General Dongan, under James, Duke of York, who had then become King of England, granted a charter to the same persons as were named in the Nicholls patent. This Dongan charter also recites that the patentees were acting "for and in behalf of themselves and their associates, the freeholders and inhabitants of the town of East Hampton." A board of trustees is created by the charter. This board included the patentees under the Nicholls charter, and adds others, and conveys all the lands of the town to the new board as "trustees of the freeholders and commonalty of the town of East Hampton and their successors." This grant was one to the freeholders and inhabitants of the town. It was to be in trust for the use of the inhabitants of the town. (*Trustees of East Hampton v. Kirk*, 68 N.Y., 459; S. C., 84 id., 216.)

Whatever use or possession was made by what are termed the proprietors from the charter, was entirely useless for any purpose. The allotments made in severalty rested on a sound basis of title. This was the grant from the crown to the town, and the town allotment to the individuals, who thereafter held in severalty. The unallotted lands continued to belong to the town, and the defendant's title thereto from the town is the only title.

The Montauk bill is an entirely different one. It had not been acquired by the town at the date of the Dongan charter, and the town was authorized to get a title. Subsequently, no doubt, one was obtained, and it had been used as private property for the purposes of pasturage for very many years. This was an allotment to individual uses, to all legal intents and purposes.

The judgment should, therefore, be reversed and a new trial granted, costs to abide event.

PRATT, J., concurred.

Judgment reversed and new trial granted, costs to abide event.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
HANNAH M. STEVENS AND ELIZABETH S. MILLER,  
APPELLANTS, v. ABRAHAM LOTT, SURROGATE OF THE COUNTY  
OF KINGS, RESPONDENT.

*Surrogate — order opening a decree — how reviewed — Code of Civil Procedure, sec. 2481, sub. 6.*

In an application made by the relator, for a final accounting by the administrator of one Stevens, the accounts of one of the administrators, Miles, which were the subject of much objection, were referred to a referee, who made a report which was confirmed by the surrogate. Before a final decree was signed, the administrator Miles moved to open the decree upon the ground that he had omitted to credit himself with a large sum, which had been paid to one of the relators. The surrogate permitted him to file a supplemental account, and referred the same back to the referee to hear and determine the question arising upon the account, and to report back the testimony. Thereupon the relators applied for a writ of *mandamus*, commanding the surrogate to forthwith make and sign the decree.

*Held*, that the application was properly denied.

That the order of the surrogate was reviewable by appeal, and that the case was not one in which the writ should be issued.

APPEAL by the relators from an order made at the Kings county Special Term, denying a motion for a peremptory *mandamus* commanding the surrogate of Kings county to forthwith make and sign a decree in a matter in which they were interested.

*Merritt E. Sawyer*, for the appellant.

*Charles J. Patterson*, for the respondent.

BARNARD, P. J. :

There is no case made for a writ of *mandamus*. The relators applied to the surrogate of Kings county for a final accounting. The account of Nathaniel Miles, one of the administrators, was the subject of much objection, and the same were referred by the surrogate to Mr. W. S. Cogswell. After a protracted hearing the referee made a report which was confirmed by the surrogate. Before a final decree was signed, the administrator Miles made an application to open the decree, upon proof that he had omitted to credit himself with a large sum, which had been paid to one of the relators, Mrs. Miller. The surrogate permitted Miles, the administrator, to file a "supplemental account thereof," with vouchers, and the same was referred back to the referee to hear and determine the questions arising upon the account, and to report back the testimony. This order was within the statute power of the surrogate. By section 2481, subdivision 6, the surrogate has power to open, vacate, set aside or modify a decree, or to grant new trials. His order in such a case is appealable, and, if erroneous, can be corrected by force of the same section. *Mandamus* is not a remedy by which such an order can be disregarded. The supplemental account involved the opening of the decree so far, and the duty of the surrogate was not a ministerial one to sign the decree, as it would have been if no supplemental account was permitted.

The order should be affirmed, with fifty dollars costs.

DYKMAN, J., concurred.

Order refusing writ of *mandamus* affirmed, with costs and disbursements.

HUN—VOL. XLII 52

ANDREW MARTIN, RESPONDENT, v. EMANUEL  
ROTHSCHILD, APPELLANT.

*Chattel mortgages—where they should be filed in Kings county—3 R. S. (6th ed.), 143, sec. 11; 1 R. S. (6th ed.), 931.*

Chattel mortgages upon property in the town of Flatbush, Kings county, should be filed in the office of the clerk of that town, and not in the office of the register of Kings county.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury at the Kings County Circuit, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

*Morris & Pearsall*, for the appellant.

*William J. Gaynor*, for the respondent.

BARNARD, P. J.:

The plaintiff claims title to certain personal property by force of a *bona fide* sale to him thereof, by one Samuel Wardell. The defendant claims that Samuel and John Wardell mortgaged the property to him by a chattel mortgage. The Wardells lived in Flatbush, King's county, and the mortgage was filed in the town clerk's office of that town. The Court held that it should have been filed in the register's office of Kings county. This was an erroneous ruling. The Revised Statutes provide for the filing of personal or chattel mortgages. In the city of New York the proper place is the register's office. In all the other cities of the State, and in the towns of the State in which a county clerk's office is kept, the instrument must be filed in the county clerk's office, and in each of the other towns of the State, in the office of the town clerk thereof. (3 R. S. [6th ed.], p. 143, sec. 11.)

It would be plain that the office of the town clerk of the town of Flatbush was the proper place to file the mortgage but for the act creating a register for Kings county. By this act all that part of the duty of the county clerk of Kings county, which in the city of New York is required to be done by the register of deeds therein, shall be done by the register of Kings county, and the clerk of

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SECOND DEPARTMENT, DECEMBER TERM, 1886.

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Kings county was forbidden to perform such duties. (1 R. S. [6th ed.], 924.)

The act in question did not change the Revised Statutes in respect to those towns of a county outside of the town in which the county clerk's office was kept. The county clerk of Kings county could not, before the act creating the register was passed, file a Flatbush mortgage, and it is only the duty of the county clerk of Kings county which the register is to perform.

The judgment should be reversed and a new trial granted, costs to abide event.

PRATT, J., concurred.

Judgment and order denying new trial reversed and new trial granted, costs to abide event.

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IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ESTATE OF  
CHARLES B. GRAY, DECEASED.

(CLAIM OF SARAH B. LOCKWOOD, APPELLANT.)

*Reference of disputed claims against an estate—what claims may be passed by the referee—his report, when confirmed, binds the surrogate and can only be reviewed on appeal.*

A claim presented to the administrator of one Charles B. Gray by the appellant, who had indorsed and became surety upon a paper made by Charles B. Gray and C. G. Lockwood, having been rejected by him was referred by consent. The paper was used in a business which Gray and Lockwood were carrying on as partners. The referee reported that the claim was a claim against the estate of Charles B. Gray, and was to be paid with the other individual debts of the deceased. This report was confirmed by this court. Upon the final settlement of the estate a decree was entered directing that the individual creditors were entitled to be first paid in full, and that the balance should be divided among the partnership claimants, among which latter was included the appellant.

*Held*, that the decree should be reversed as the report of the referee, having been confirmed by this court, was binding upon the parties and the surrogate and could only be reviewed by an appeal. (PRATT, J., dissenting.)

APPEAL from a decree of the surrogate of Orange county, entered on the final judicial settlement of the estate of Charles B. Gray, deceased.

The appellant was surety and joint maker upon a joint and several promissory note for \$2,000, an accommodation indorser upon a similar note of \$170, and an accommodation indorser upon four joint notes, aggregating \$860. All of these notes were signed by Charles B. Gray and C. G. Lockwood. All have been paid by the appellant and the notes are now in her possession.

Charles B. Gray and C. G. Lockwood were, in 1875, copartners doing business under the firm name of Gray & Lockwood. The assets of the firm have been disposed of. The firm ceased to do business several years before the decease of Mr. Gray, and both the firm and its surviving member are insolvent. The claims of Mrs. Lockwood were duly presented to the administrator, were by him rejected, and a reference was had thereon, under the statute, relative to claims against estates of deceased persons. The referee reported that all of Mrs. Lockwood's claims were just demands against the estate of Mr. Gray, and that she was entitled to share equally with his individual creditors in its distribution. Judgment in accordance with his report was duly granted and entered.

The surrogate was requested to find that the judgment of the Supreme Court was conclusive upon him as to the matters therein determined, which he refused to do, and an exception was taken to such refusal. He was also requested to find separately that the appellant was entitled to share equally with Mr. Gray's individual creditors as to the amount paid by her on the \$2,000 note, but this request was refused and exception duly taken. Like requests were separately made as to the sums paid on the \$170 note, and on the other notes. These requests were denied, and exceptions were taken to such refusals. The surrogate held that all of Mrs. Lockwood's claims were, in effect, debts of the firm of Gray & Lockwood, and that payment must be deferred until the individual debts of Mr. Gray had first been paid in full.

*C. E. Cuddeback*, for Sarah E. Lockwood, claimant, appellant.

*Lewis E. Carr*, in person, and for individual creditors of Gray, respondent.

BARNARD, P. J. :

The judgment of the Supreme Court was binding upon the Surrogate's Court. The appellant held claims, as she alleged, against

the estate of Charles B. Gray. The administrators rejected the claim. It was referred, under the statute, and it appeared that the appellant had indorsed and become surety upon papers made by Charles B. Gray and G. C. Lockwood. They were partners, and intended to use the money in their business, and did so. The referee reported that the claim was a claim against the estate of Charles B. Gray, and entitled to share with the individual creditors of the deceased. This report was confirmed by this court. The statute is very general in respect to claims against deceased persons, but broad enough to determine whether a creditor was entitled to share with the individual creditors of deceased, or whether the claim was one which must await the payment in full of partnership debts before it was entitled to payment out of the assets. Besides this, it was the very thing submitted to the referee by both parties, by consent to adjudicate upon her claims against the estate, and the adjudication in a court having jurisdiction of the subject-matter and the parties was binding, and could only be reviewed by appeal. (*Fisher v. Hepburn*, 48 N. Y., 41.) It was as valid as if commenced by ordinary process. (2 R. S., 89, § 37.)

As to the \$2,000 note, the appellant was a surety. It was a joint and several note, and when the surety paid it she took the place of the debt, as one against the individuals who made the note and each of them.

The decree should be reversed and the proceedings remitted to the Surrogate's Court, with directions to allow the appellant's claim as an individual debt against the estate, with costs to appellant out of the estate.

DYKMAN, J., concurred.

PRATT, J. (dissenting):

On the reference under the statute the order of distribution of the assets of the estate was not in question. That was not a question which the administrator could legally submit in that proceeding, and what was done in that respect was not binding on the other creditors. They now have, for the first time, the opportunity to be heard. The jurisdiction of a court to render a judgment can always be inquired into.

The decree of the surrogate should be affirmed.

SECOND DEPARTMENT, DECEMBER TERM, 1886.

Decree of surrogate reversed and proceedings remitted, to the end that this appellant's claim be allowed as an individual debt. Costs of the appellant out of the estate allowed on appeal.

CHARLES RAHT, AS EXECUTOR, ETC., OF JULIUS E. RAHT,  
DECEASED, PLAINTIFF, v. HENRY Y. ATTRILL AND OTHERS,  
DEFENDANTS.

(PROCEEDINGS AS TO SURPLUS MONEYS.)

*Receiver of a corporation — power of the court to direct him to issue certificates to pay wages due to employees — when they cannot be made to affect a prior lien by mortgage.*

Upon an application for the distribution of the surplus moneys arising upon the foreclosure of a mortgage, subject to which the Rockaway Beach Improvement Company had purchased the mortgaged premises, it appeared that after the purchase, and in April, 1880, the company executed a mortgage on the same property to one Soutter, trustee, to secure the payment of 700 bonds of \$1,000 each; that in August, 1880, the company having become embarrassed, one Attrill, a large stockholder, brought an action against it, to which neither the trustee of the said mortgage, nor the holders of bonds thereunder, were made parties, praying for the appointment of a receiver and the dissolution of the company. In this action an order was made appointing a receiver, and thereafter *ex parte* orders were made authorizing the receiver to borrow \$100,000 to pay wages due the workmen and to issue certificates therefor, which certificates were to be a first lien upon all the property of the company, and have priority over the mortgage to Soutter, as trustee.

*Held*, that there was no principle upon which the claims of employees for labor performed, before the receiver was appointed, could be so extended as to impair or postpone the lien of the mortgage.

*Metropolitan Trust Company v. Tonawanda Railroad Company* (108 N. Y., 245) followed.

That affidavits showing that the property was in danger of being destroyed from the passion of unpaid workmen unless such certificates were issued, did not authorize the court to make the order.

That the fact that Soutter was a stockholder and director of the company, as well as the trustee of the bondholders, and that as one of the directors he approved of the orders authorizing the certificates to be issued, did not prove that he, as trustee, consented to violate his duty to the bondholders, even if he could represent them for such a purpose.



APPEAL from an order made at the Kings county Special Term, confirming the report of a referee as to the distribution of certain surplus moneys arising upon a sale under a decree of foreclosure.

In February, 1880, the Rockaway Beach Improvement Company (Limited) was organized under the business corporations' act (Laws 1875, chap. 611). It bought over 100 acres of land at Rockaway Beach, subject to a purchase-money mortgage for \$72,000, made by Henry Y. Attrill to one Littlejohn. Littlejohn assigned to Raht, whose executor brought this action of foreclosure. On April 1, 1880, the Rockaway Beach Improvement Company (Limited) executed a mortgage on the same property to William K. Soutter, trustee, to secure the payment of 700 bonds of \$1,000 each. Twenty-six of these bonds were disposed of for value, the balance were pledged as collateral for loans to the company. The company became embarrassed, and on August 2, 1880, Henry Y. Attrill, a large stockholder, began an action against the company on behalf of himself and all other stockholders who should unite with him, praying for the appointment of a receiver and the dissolution of the company.

The complaint alleged the organization of the company, February 16, 1880, capital stock, \$700,000; the pledging of \$700,000, first mortgage bonds, at fifty cents on the dollar, to secure loans to the company; that there was due for materials, \$100,000; on contracts for furniture, \$130,000; for wages, \$60,000; that the men had refused to work; that one-half had left, the others were working on promise of payment; that large sums will be necessary to complete the work; that no provision has been made therefor, nor to meet maturing loans on bonds, which will be sacrificed; that delay ensues, depreciating the value of the property; that plaintiff has been unable to get a statement of the affairs of the company, though willing to assist it by large advances; and feared that a continuance of the then improvident management will result in serious loss to plaintiff and the company; that the hotel and land are the only resource for the payment of the company's debts; that, in its present condition, it is wholly unproductive; that the company is insolvent, or nearly so; that this can only be prevented by intervention of the court and appointment of a receiver, and prays for dissolution of the company and appointment of a receiver. Upon

this complaint alone Mr. Justice DONOHUE made an order, August 2, 1880, appointing John A. Rice receiver of all the property and effects of the Rockaway Beach Improvement Company (Limited) to take possession of and administer the same for the benefit of all concerned. On the 3d of August, 1880, the same judge made an *ex parte* order on the affidavit of Benjamin E. Smith, the general manager of the company, authorizing the receiver to borrow \$100,000 to pay wages due the workmen and issue certificates therefor, and, also, to borrow \$10,000 to purchase materials necessary to complete the hotel.

The affidavit of Mr. Smith is dated August 3, 1880, and is, in substance, as follows: The company is in process of building a hotel, having nearly 2,000 men employed. Owing to delay in paying, they all, a short time ago, refused to work; one-half left. About 800 were then working under promise of payment; that no provision has been, or can be, made for payment by the company; that if not paid the men will stop work, and this deponent fears a serious disturbance; that it is imperative that the receiver in this cause be authorized to borrow \$100,000 to pay the workmen, which can be raised on receiver's certificates. On the 11th of August, 1880, an *ex parte* order was made by the same judge authorizing the issue of receiver's certificates to the amount of \$110,000 to be paid to the employees of the company, said certificates to be a first lien upon all the property of the company, and prior to the mortgage to William K. Soutter, trustee. A similar order was made, August 17, 1880, limiting the amount of certificates at \$130,000. Under this order Drexel, Morgan & Co., Morton, Bliss & Co., and Hatch & Peters, took \$110,000 of receiver's certificates at par for cash, and they have been awarded the surplus moneys arising out of the sale of the mortgaged premises in preference to the holders of bonds secured by the prior mortgage to W. K. Soutter, trustee. The legality of this decision is the question brought up for review. In addition to the papers before the court, and on which alone it acted, the holders of the receiver's certificates sought to sustain their claim by introducing extraneous evidence to the effect that after the appointment of the receiver and the making of the affidavit of August third by Mr. Smith, the workmen were in a state of riot, threatening to fire and destroy the hotel. They refused to take the

receiver's certificates, and mobbed three or four men who had done so; that from this cause the property was in great peril. At a mass meeting of the workmen they consented that a Mr. McDonald should negotiate \$110,000 of receiver's certificates, which he subsequently did, to Drexel, Morgan & Co. and the others, as above stated. This evidence was admitted over appellant's objection and forms the basis of a finding in favor of the receiver's certificates as an equitable lien.

*Lewis Sanders* and *Thomas M. Wheeler*, for the bondholders, appellants.

*John L. Cadwalader* and *James B. Ludlow*, for claimants Morton, Bliss & Co., Drexel, Morgan & Co., and W. B. Hatch.

*James McNamee*, for George H. Daley, claimant.

*Clarence D. Ashley*, for Attrill & Marache, holders of receiver's certificates, appellants.

*Edward S. Clinch*, for Robinson & Wallace, mechanics' lienors, and Aaron A. De Grauw, receiver, etc., appellants.

*R. W. Keene*, for defendant, Barbara Edward.

BARNARD, P. J.:

One of the principal points involved in this appeal has, since the argument, been decided by the Court of Appeals in the case of *Metropolitan Trust Company v. Tonawanda Valley, etc., Railroad Company* (103 N. Y., 245). In that case, as in this, the Special Term made an order that certain receiver's certificates given for labor performed before the appointment of the receiver, should be preferred to a mortgage lien which existed upon the property. The Court of Appeals held that there was no principle upon which the claim of employees for labor performed before the receiver was appointed, could be so extended as to impair or postpone the lien of the mortgage. The Court of Appeals, in its opinion, calls this class of creditors "mere general creditors, with no special equities," as against prior liens.

The present case differs only in this, that instead of an appeal being taken from the order authorizing the certificates, the question is first raised upon the reference as to the distribution of the sur-

plus moneys under the purchase-money mortgage. The appellant claims that the certificates awarded preference on claims "with special equities." The property was in danger from the passions of unpaid workmen, and these certificates were used to prevent its destruction. The Court of Appeals decision seems to have been made upon a different theory. In that case the claim was made that the property had been enhanced by the labor of the workmen which was included in the mortgage. The court says in reply to this, "it is easy to see that under such a plea the lienor might be entirely defeated, and the foreclosure of his mortgage rendered inoperative and useless. Such a result, except upon his consent, the court have no power to sanction."

The next question is whether the order was consented to in such a way as to be a formal estoppel against the mortgage lien. The difficulty here principally arises from the fact that Soutter is at once stockholder and director in the company, and trustee for the bondholders. As one of the directors, he consented to the action to dissolve the corporation, to the appointment of a receiver, and he approved of the orders authorizing the certificates in question. This is fairly inferable, although he denies in his testimony that he knew of the proceedings, except from the publication of the proceedings from time to time in the newspapers. No decree was entered, and as he was trustee there is no consent. When the certificates were authorized the trustee was not a party to the action. To hold, under this inconclusive proof, that the trustee, as trustee, consented to violate his duty to the bondholders under the mortgage, would not be warranted even if the trustees could represent the bondholders for such a purpose. After a careful examination of the case, we think that the weight of authority is not of an order which sets aside liens to the advantage of a general creditor. That it is only the income of the property which courts apply to the payment of current expenses before the mortgage debt is paid. That it is not right to entirely displace the lien. (*Burnham v. Bowen*, 111 U. S., 782.)

There were no earnings, and there are no receivers' certificates which have a right of payment before the Soutter mortgage, including the Daily certificates.

The order confirming report should be reversed, and the report

set aside, and order of reference vacated, costs to the trustee appellant out of the fund, and to the respondent on his appeal as to the Daily claim, out of the fund.

DYKMAN, J., concurred.

Order confirming report reversed, and report set aside, and order of reference vacated; costs to the trustee appellant out of the fund, and to the respondent on his appeal as to the Daily claim, out of the fund.

ELLEN PHELAN, AS ADMINISTRATRIX, ETC., OF GEORGE F. PHELAN, DECEASED, APPELLANT, v. THE NORTH-WESTERN MUTUAL LIFE INSURANCE COMPANY, RESPONDENT.

*Forfeiture of a policy of insurance by the non-payment of the premium — what notice must be given to the policyholder — chap. 321 of 1877.*

Chapter 321 of 1877, after declaring that no life insurance company doing business in this State shall have power to declare forfeited or lapsed any policy thereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided, directs that whenever any premium or interest due upon a policy shall remain unpaid when due, a written or printed notice shall be addressed and mailed to the person whose life is assured, stating that unless the said premium or interest then due shall be paid within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void, "provided, however, that a notice stating when the premium will fall due, and that if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty, and not more than sixty, days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

*Held*, that when a notice was given in advance of the time when the premium would become due, the company might, in case the premium were not paid on the day it became due, declare the policy forfeited at once.

The notice served in this case by the defendant company stated the place and time at which the premium was payable, and the amount thereof, and added: "The conditions of your policy are that payment must be made on or before the day the premium is due, and members neglecting to pay are carrying their own risk. Agents have no right to waive forfeitures." Under the signature and address were printed the words, "prompt payment is necessary to keep your policy in force."

*Held*, that the notice was sufficient.

That, although it did not state in the words of the act that, unless the premium were paid, "the said policy and all payments thereon will become forfeited and void," it fairly notified the insured that, unless payment were made on the day, the policy would be forfeited.

APPEAL from a judgment in favor of the defendant, entered upon an order dismissing the complaint made by the court upon the trial of the action at the Kings County Circuit.

*Raphael J. Moses, Jr.*, for the appellant.

*William Peet and David Wilcox*, for the respondent.

BARNARD, P. J. :

The proof shows that in March, 1880, the plaintiff's intestate, George F. Phelan, took out a policy of insurance upon his life in the defendant's company. The amount was \$3,000. The premiums were payable quarterly. The payments of the premiums had not always been made regularly, but it is a condition of the policy that a waiver of a forfeiture shall not be deemed an acquiescence as to the future by the company. There was a payment due 31st December, 1882, which was not paid. By the condition of the policy, this non-payment gave the right to the defendant to treat the policy as null. By chap. 321, Laws of 1877, forfeitures for non-payment are prevented, unless a company gave a notice according to the direction of the act. The case turns upon the section, and it is as follows :

"No life insurance company, doing business in the State of New York shall have power to declare forfeited or lapsed, any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice, stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid by the company, or by an agent of such company or persons appointed by

it to collect such premium. Such notice shall further state that, unless the said premium or interest then due shall be paid to the company, or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy, in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited, or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

There was served upon the insured by mail, directed to 37 Barclay street, N. Y., a notice, which is as follows:

"OFFICE OF THE NORTH-WESTERN MUTUAL LIFE INSURANCE CO., }  
MILWAUKEE, WISCONSIN, *November 1, 1882.* }

"GEORGE F. PHELAN, 37 Barclay Street.

"The 4 qr. premium of \$17.40 on your policy No. 102,320, falls due at the office of the agent of this company in New York City, N. Y., before noon on the 31st day of December, 1882. The conditions of your policy are that payment must be made on or before the day the premium is due, and members neglecting so to pay are carrying their own risk. Agents have no right to waive forfeitures.

"Please present this notice at the time of payment.

"Yours respectfully,

J. W. SKINNER.

*Secretary.*

"H. M. MUNSELL,

*Gen'l Agent Northwestern Mutual Life Co.*

160 Fulton St. Office Cor. Broadway, N. Y. City.

"Prompt payment is necessary to keep your policy in force."

We think the intent of the statute was to prevent forfeiture on the part of an insurance company, unless a notice of non-payment of a premium be given at least thirty days before such forfeiture; but that a notice in advance of the time when the premium would become due made it possible for the company to declare the policy forfeited by reason of non-payment at the day it became due. In other words, that the provision, at the end of the section, that the notice in advance of the payment becoming due "shall have the same effect" as the notice given subsequent to the default, did not mean to give thirty days additional time after the payment was due. The object of the statute was to give careless persons a notice of the time of payment either in advance, for at least thirty days, or that thirty days should be given them after notice of default.

The notice itself was sufficient. It states the amount of the payment, the number of the policy, when it is due and where it is payable. It did not state, in the words of the act, that upon default of payment "all payments thereon will become forfeited and void." It did state that the conditions required a payment at the day, and that upon default members insured "are carrying their own risks;" that "agents have no right to waive forfeitures," and that "prompt payment is necessary to keep your policy in force." The notice fairly notified the insured that unless payment was properly made at the day, the policy would be forfeited.

The judgment should, therefore, be affirmed, with costs.

DYKMAN, J., concurred; PRATT, J., not sitting.

Judgment affirmed, with costs.



**WILLIAM JAGGER, INDIVIDUALLY AND AS EXECUTOR, ETC.,  
OF DAVID JAGGER, DECEASED, APPELLANT, v. JOHN H.  
BIRD, AS EXECUTOR, ETC., OF MARY E. GREEN, DECEASED,  
AND OTHERS, RESPONDENTS.**

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*Deposit in a bank by a life tenant, of moneys received under an insurance policy on a mill — when it will be considered, as between two remaindermen in whose names the deposit was made, as personal property.*

The plaintiff and his sister, the defendant's testatrix, owned an undivided one-half of a certain mill property, subject to the life estate in such undivided half of their father, who was, in 1879, the time when the mill was destroyed by fire, over eighty years of age. One-half of the amount received under the policy of insurance, which had been issued to the father and one Luce the owners of the mill property, was, with the consent of the father, deposited in a savings bank to the credit of the plaintiff and his sister, subject to draft by both. The mill was not rebuilt.

In March, 1883, the sister died, having made a will in 1870 by which she left her interest in the mill property to the plaintiff, her brother, and in May, 1884, the father died, making the plaintiff his executor, and leaving to him all the residue of his estate. Thereafter the plaintiff brought this action, claiming to be entitled to the whole amount of the deposit in the savings bank, as the devisee of his sister, if the fund was to be treated as realty, and as the executor of, and a legatee under, the will of his father, if it were to be treated as personalty.

*Held*, that the claim was untenable.

That the fund was to be regarded as personal property which was owned by the brother and sister jointly.

APPEAL from a judgment in favor of the defendant, John H. Bird, executor, entered upon the decision of the court at Special Term.

In this action the plaintiff sought to recover the sum of \$1,125 on deposit in the Riverhead Savings Bank, and the accumulated interest thereon, and to have it adjudged that, as a matter of equity, he was entitled to the whole of the said deposit and interest, as against both the Riverhead Savings Bank and John H. Bird, the executor of the will of Mary E. Green. The facts, which are undisputed, are as follows: The plaintiff and Mary E. Green were the children of one David Jagger, and from the year 1870 down to the time of her decease, the plaintiff and his sister, the said Mary E. Green, were the owners in fee as tenants in common of an undivided half of a certain mill property, subject to a life interest possessed by their father, David Jagger. The owner in fee of the

other undivided half was one A. B. Luce. In the year 1870 Mary E. Green made her will, by which she devised her interest in the mill property to her brother, and appointed the defendant, John H. Bird, her executor. In July, 1878, the mill was insured, and from that time until December, 1879, was kept insured to the amount of \$2,500 (that being the full value of the property), in the joint names of the said David Jagger and A. B. Luce, who were engaged in carrying on business at the mill under the name of Jagger & Luce. In December, 1879, the mill was burned down, and David Jagger, who was at that time eighty-one years old, received from the insurance company a check for \$1,125 (A. B. Luce receiving the other half of the insurance money), and immediately indorsed the said check to his son, William Jagger, who with the assent of his father, deposited the check in the Riverhead Savings Bank, to the credit of himself and his sister, and had the account opened in their joint names and "subject to draft signed by both." His sister, Mary E. Green, was informed of this, but neither she nor her brother ever made any draft on the deposit, and from that day to this it, and the accumulating interest, has remained there undisturbed. It did not appear who received the deposit-book, or whether any was issued. In March, 1883, Mary E. Green died, leaving her will above referred to, and the defendant, John H. Bird, duly qualified as executor. In May, 1884, David Jagger, the life-tenant, died, and the plaintiff, William Jagger, duly qualified as his executor, and now claims the whole of the deposit, including Mary E. Green's half, on the ground that if it is deemed personalty, he is entitled to it as executor under the will of David Jagger, and as entitled to all the rest, residue and remainder of his estate as his residuary legatee and devisee; and if it is deemed realty, he is entitled to it under the devise of the mill property in the will of Mary E. Green. The defendant, John H. Bird, claims that the money is personalty, and that as such he is entitled to one-half of it, namely, \$685.64, as the executor and residuary legatee (in trust) of all the personal property of Mary E. Green.

*B. K. Payne*, for the appellant.

*George F. Canfield*, for the respondent John H. Bird.

BARNARD, P. J. :

At the time of the death of Mary Green there stood on deposit in the Riverhead Savings Bank, to the credit of her brother and herself, the money in question "subject to draft by both." This deposit was the amount of a fire loss upon a policy of insurance upon an old mill, which was owned by the parties in common with one Luce, who owned an undivided one-half.

The half of Mary Green and her brother was subject to the life estate of their father therein, who was, at the time of the fire, over eighty years of age. The parties did not rebuild or replace the mill, but deposited the money in the savings bank in the manner stated. The deposit was made with the assent of the father. The father died, and the brother of Mary Green, William, is his executor. After the deposit had remained in the bank some four years, Mary Green died, and she is represented by the defendant Bird. By her will she gave her interest in the old mill to her brother. It was within the power of the owners to convert the insurance money into personal property, even if it was real property, after it was received of the insurance company. Presumptively they did this, from the manner of deposit and from the length of time the deposit remained untouched.

This accords with the surrounding circumstances. The mill was old and the life-tenant was very old, and it appears that he consented to look to his children rather than to conduct the mill. The other owner had taken his share of the insurance, and he appears to have not intended to rebuild. The finding of the trial judge, that the deposit was personal property, is fully sustained by the evidence.

The father, after he gave up the insurance money to his children, had nothing more than an equitable right against his children for the interest on the money received. He had no interest in the deposit in the absence of fraud. As between the children the deposit was one of joint ownership. (*Martin v. Funk*, 75 N. Y., 142; *Willis v. Smith*, 91 id., 298.) It was a joint ownership of the deposit as personal property. (*Hastings v. West. Fire Ins. Co.*, 73 N. Y., 141.)

The judgment should be affirmed, with costs.

PRATT, J.:

The deposit of the fund in the savings bank, in the joint names of the plaintiff and Mrs. Green, raises the presumption that it belongs to them in equal shares. We find no evidence to repel this presumption, and believe, with the judge at Special Term, that the owner of the life estate waived his claim in favor of the heirs. Nor do we find any evidence that the heirs regarded the fund in bank as in any way different from other personal property owned by them. No decision quoted goes so far as to hold that a policy of insurance will continue in favor of the heir, unless expressly made for his benefit. And if he could not claim under a policy issued to his ancestor, still less can he, as heir, claim the fund where the ancestor collected the indemnity.

The cause was correctly decided, and judgment must be affirmed, with costs.

Judgment affirmed, with costs.

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HARRIET GIGNOUX AND ELIZABETH A. GIGNOUX,  
PLAINTIFFS, v. MARY E. STAFFORD, DEFENDANT.

*Sale by assignees in bankruptcy under the United States statute chapter 9 of 1841—power of the court to order a private sale without specifying the time thereof.*

Section 9 of the bankrupt act of 1841, providing that all sales by assignees "shall be made at such times and in such manner as shall be ordered and appointed by the court," was intended to apply to public sales only, and not to a private sale ordered by the court.

*Smith v. Long* (12 Abb. N. C., 118) distinguished.

SUBMISSION of a controversy upon an agreed statement of facts.

The plaintiffs entered into a written agreement with defendant, April 21, 1886, to sell to defendant certain real estate on the southerly side of St. Mark's avenue, in Brooklyn. The defendant paid the usual ten per cent, amounting to \$180, and sixty dollars auctioneer's fees, and agreed to pay balance of the purchase-money June 1, 1886, when it was agreed that the plaintiffs should deliver to defendant a deed with the usual full covenants, and free and clear of all incumbrances. June 1, 1886, the deed was duly tendered and the

balance of the purchase-money demanded, but defendant refused to accept the deed and pay the balance, upon the ground that plaintiffs could not convey a good title to said premises as agreed between them, and demanded repayment of the ten per cent and auctioneer's fees aforesaid, and her expenses in examination of title. The facts upon which defendant bases her objections to the title were as follows: In 1841, James E. Underhill, now deceased, was seized of the premises about which this controversy arises. October 27, 1841, a creditor's bill was filed against Underhill in chancery, a receiver was appointed in the action, and an order was made that Underhill assign all his property to said receiver, and on June 18, 1842, Underhill made and delivered an assignment in writing, under seal, to said receiver of his property pursuant to the order of the Court of Chancery. July 7, 1842, said Underhill filed a petition, with schedules as a bankrupt, in the District Court of the United States, asking to be discharged from his debts under the bankrupt act of the United States of 1841. In the schedule annexed to his petition he mentioned the judgment creditors in the aforesaid chancery suit, and states that under the order of the Court of Chancery he had made an assignment of his property to the receiver, and annexed a copy of the said assignment. Down to the time of making and recording the deed of the assignee in bankruptcy, hereafter set forth, the assignment to the receiver does not appear upon record in Kings county, nor do the records of said county down to that time show any conveyances by the receiver of any of Underhill's estate.

In the bankruptcy proceedings the bankrupt, Underhill, made, under order of the United States Court, an assignment to William Coventry H. Waddell, general assignee, etc., of all his property, and the general assignee duly reported such assignment August 5, 1842. In March, 1858, the following proceedings were had:

“SOUTHERN DISTRICT OF NEW YORK,

“IN BANKRUPTCY.

“In the Matter of JAMES E. UNDERHILL, a Bankrupt.

“*Decree August 5, 1842.*

“The official or general assignee, to whom the estate of the said bankrupt was confided by decree aforesaid, respectfully reports that an application has been made to him to procure all the interest

which the said bankrupt had of, in and to certain streets set forth in a map, entitled 'Map of lots adjoining Parmentier's garden, belonging to James E. Underhill and others, situate in the city of Brooklyn, surveyed and laid out by R. Graves, October, 1834, and filed in the office of the register of Kings county, in the State of New York, March 30, 1835, wherever the same may not have been covered by the mortgages which have been foreclosed upon the lots set forth in said map, or where the same may have been fully set forth and covered thereby for a nominal consideration and the costs and charges of the assignee thereon, and the assignee aforesaid having carefully examined the subject-matter thereof, now moves the court for an order as follows, to wit:

"*Ordered*, That the official or general assignee be authorized to sell and dispose of the property herein referred to in manner aforesaid, at private sale, pursuant to the rules of said court.

"WM. COVENTRY H. WADDELL,

"*Official or General Assignee.*

"Dated *March*, 1858."

Indorsed: "Southern district of New York, in bankruptcy. In the Matter of James E. Underhill, a bankrupt. Report of assignee and order of sale. Order, S. R. Betts. Filed March 10, 1858."

The said general assignee thereupon conveyed the premises to one Leah Van Winkle, under whom the plaintiffs claim. The defendant claimed that the order directing the sale by the assignee was void because it did not fix the time of sale.

*William C. De Witt*, for the plaintiffs.

*A. W. Gleason*, for the defendant.

BARNARD, P. J. :

The case of *Smith v. Long* (12 Abb. N. C., 113) has no application to the facts of this case. By the bankrupt act of 1841, chapter 9, sales of property under its provisions were to be "made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy." The Court of Appeals held, in a case of public sale, that the bankrupt court must fix the time of the sale. The bankrupt court could, however, authorize a private sale, and in respect to the land in question, did authorize the assignee in bankruptcy to

sell it at private sale, which was done. The court, in such a case, was not bound to name a time when the sale should be consummated. The object of the law was to prevent sales without due proof of publicity. This provision would not apply to a private sale when a court, in the exercise of an undoubted power, authorizes a private sale, and fixes the consideration in the order. It would be an entirely useless requirement to fix a day for this private sale so authorized.

The assignment to the receiver in chancery in some way became inoperative. The creditors who instituted the proceedings were made parties to the proceedings in bankruptcy. The assignment to the receiver was annexed to the bankruptcy proceedings, and after this the bankruptcy court ordered the sale of the lands conveyed by it. This must have been based either upon the assignment to the receiver being void under the bankrupt act, or by reason of the creditors preferring a distribution under that act. In either event the creditors were bound by the sale ordered by the United States District Court.

The title is not a doubtful one, but is good, and the defendant should take the same under her agreement.

PRATT, J. :

This is a submission of controversy, and the only question seriously raised is whether a sale by a general assignee in bankruptcy under an order that does not fix the time when such sale shall take place is valid.

Section 9 of the act provided that all sales by assignees "shall be made at such times and in such manner as shall be ordered and appointed by the court." The order under which the sale took place was as follows: "Ordered that the official assignee be authorized to sell and dispose of the property herein referred to, etc., at private sale, pursuant to the rules of said court." It is conceded the court had power under other provisions to order a private sale.

It will be at once seen that if the act in question is to be construed so that the court must appoint a time when the property should be sold at private sale, the power to sell at private sale is nugatory. No court could appoint a time when property should be sold at private sale, and hence such a construction cannot be

entertained. The whole law upon this subject must be read and all its parts construed in connection with each other. The section simply means that when a *time is appointed* it must be sold, but the court can direct the manner, and if it directs a manner in which it is impossible to appoint the time, the sale is not void. The specific words of the statute can be given their full force and meaning by applying them to sales ordered to be made at auction, and the time fixed for such sale to take place. The case of *Smith v. Long* (12 Abb. N. C., 113) is invoked as authority against this sale. That case has no application, as the sale was a public one, and the time could have been appointed.

The interpretation I have put upon this statute follows the general practice in the United States courts for a long series of years, and if it is not the proper one, then a large number of land titles will be thrown into inextricable confusion and doubt. It cannot be that the State courts, at this late day, will so interpret a statute as to run counter to the established practice in the United States courts, and throw doubt over the title of an immense amount of property that is held by virtue of such sales, especially when full effect can be given to the words of the statute, by holding that the appointed does not refer to an order providing for a private sale. The doctrine of the case of *Smith v. Long* does not cover this case, and it is not likely to be extended, in view of the consequences it would entail. We think the sale here by the assignee was valid, and carried the title.

A point is made that the title here is in a receiver in chancery, but it does not appear that any such conveyance was ever recorded, and it appears that the plaintiff is a *bona fide* purchaser, and has been in exclusive possession for twenty years. We have no hesitation in holding that the title is good, and that defendant must take it.

Judgment for affirmance.

Judgment for the plaintiff on submitted case.



JOHN ANDERSON, AS SURVIVING EXECUTOR, ETC., OF ISAAC DE MOTT, DECEASED, PLAINTIFF, v. ROBERT A. DAVISON, DEFENDANT.

*Will—when legacies are charged upon real estate.*

The plaintiff's testator, after giving to his wife the use of two rooms of his dwelling-house and also the use of \$10,000, to be paid to her annually during her natural life in lieu of her dower, and to each of four grandchildren the sum of \$4,000, to be paid to each on arriving at the age of twenty-one years, gave and bequeathed "all the rest, residue and remainder of my (his) real and personal estate, goods and chattels of what kind and nature soever," to his only son, Charles. He appointed Charles and two other persons executors, and empowered them to sell all his real estate. The personal estate was never sufficient to satisfy the said gifts and bequests, and some of it was lost by the residuary legatee, Charles White, while acting as executor.

*Held*, that the legacies were charged upon the real estate, and that the sole surviving executor had power to sell the real estate to provide a fund from which to pay them.

SUBMISSION of a controversy upon an agreed statement of facts.

The question submitted was whether or not the plaintiff, as the survivor and only acting executor of the last will and testament of Isaac De Mott, deceased, had the power to sell the real estate of one De Mott, and convey a good title thereto.

On the 16th day of January, 1877, Isaac De Mott died, leaving a last will and testament, which contained, among others, the following provisions:

"*First.* I give and bequeath to my wife, Jane De Mott, the use of the choice of two rooms of my dwelling-house, and also the use of \$10,000, to be paid to her annually by my executors herein named during her natural life, to be accepted and received by her in lieu of dower.

"*Secondly.* I give and devise to my grandchildren, Laura De Mott and Theodore De Mott and Julius De Mott and Lydia De Mott and Walter De Mott, the sum of \$4,000, to be paid to each of them as soon after my decease as they arrive at twenty-one years of age.

"*Third.* And I hereby give and bequeath to my only son, Charles S. De Mott, and lastly, as to all the rest, residue and remainder of my real and personal estate, goods and chattels of what kind and nature soever.

"*Fourth.* I do hereby nominate and appoint my son, Charles S. De Mott, and my brother, Daniel De Mott, and John Anderson, to be the executors of my last will and testament, hereby revoking all former wills by me made.

"*Fifth.* I hereby empower my said executors to sell all my real estate, private or public sale, as to the best advantage."

Jane De Mott, the widow of said Isaac De Mott, died at Hempstead, aforesaid, on the 15th day of April, 1882; Charles S. De Mott, the acting executor of said will of Isaac De Mott, and the residuary legatee therein named, died at Hempstead, aforesaid, on the 6th day of September, 1885, and since his death John Anderson, the surviving executor named in the will of Isaac De Mott, has taken charge of the papers of his estate and assumed control thereof. All the personal estate, with the exception of a few hundred dollars which belonged to the estate of Isaac De Mott, had been expended or lost by the said Charles S. De Mott, acting executor, in his lifetime; and there is no personal estate of the said Isaac De Mott, deceased, nor of the said Charles S. De Mott, deceased, with which the said legacies can be paid, and the same cannot be paid or reserved, excepting out of the real estate of the said Isaac De Mott, deceased; there still remains certain real estate of the said Isaac DeMott, in and about the town of Hempstead, Queens county, amounting in the aggregate to the value of about \$15,000.

*A. N. Weller*, for the plaintiff.

*Robert A. Davison*, for the defendant in person.

BARNARD, P. J.:

The intent of the will seems to be plain, that his entire estate, real and personal, is charged with the payment of debts and the legacies named in the will. It is only the "rest, residue of my real and personal estate" which is given to the son Charles. If this be the true construction of the will, the sale is imperatively ordered. A power to sell, although described in words merely empowering the executor to do so, is imperative when the purposes of a will require a sale. (*Mott v. Ackerman*, 92 N. Y., 539.) If the power of sale was imperative, a sale could be made even by an administrator with the will annexed. (*Cooke v. Platt*, 98 N. Y., 35.) A power of sale

given by will can be executed when the fee is devised to residuary legatees. The power is not inconsistent with the devise. (*Crittenden v. Fairchild*, 41 N. Y., 289.) The facts in this case show a necessity of the sale for the purposes of the execution of the provisions of the will. By its terms \$10,000 was to be invested to produce an annual income to the widow for life, and \$20,000 was given absolutely to the grandchildren. There was never enough of the personal estate to raise these sums after the debts were paid, and the residuary legatee who was then acting executor has in some way lost it. The infant grandchildren should not be held responsible for the mismanagement of the executor. The title is therefore good and the defendant should take the same.

PRATT, J. :

The question in this case is whether plaintiff, as executor, has the power to sell lands of his testator. The will of plaintiff's testator contains a power of sale, coupled with no trust. Before the creation of the power the testator had devised to his son all of his real estate. There is no discretion in the will as to what disposition shall be made of the proceeds of sale. But there are a number of specific legacies amounting in the aggregate to \$30,000. The personal property left by testator amounted to \$20,000, and there were debts to the amount of about \$3,000.

The residuary clause to the will seems to blend the real and personal property in one fund. There is no specific devise of real estate, but the legacies are made payable out of the whole estate without distinction so far as any language in the will is concerned. It is plain from reading the whole will that the testator intended the legacies to be charged upon the realty. (*Hoyt v. Hoyt*, 85 N. Y., 142; *Scott v. Stebbins*, 91 N. Y., 605.) The clause conferring the power is as follows: *First*. I hereby empower my executors to sell all my real estate, private or public sale, as to the best advantage.

It will be observed that the language is clear and emphatic, and leaves no room for conjecture. Nothing can be more manifest than the fact that the testator intended to authorize the executors to sell his real estate. The surrounding circumstances all show such an intention. The giving of legacies far beyond the amount of his personal property, and the direction to set apart ten thousand dol-

lars and invest it for the use of his widow, make the will inconsistent with any other theory. Such a power can be upheld by authority. (*Crittenden v. Fairchild*, 41 N. Y., 289; *Scott v. Stebbins*, *supra*; *Kinnier v. Rogers*, 42 N. Y., 537.)

A judgment should be entered for the plaintiff upon the case submitted, requiring the defendant to accept the plaintiff's deed, and to pay the consideration, without costs.

Judgment for plaintiff upon submitted case.

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IN THE MATTER OF PROVING THE LAST WILL AND TESTAMENT OF  
EDWIN B. HUNT, DECEASED.

*Will—what proof as to its execution by the testator will justify its admission to probate.*

The deceased, a clerk in the employment of Sleight & Petty, drew his own will and had it signed by his employers as witnesses. It contained the following attestation clause: "We, the undersigned witnesses, have signed the within in the presence of each other and of the testator, who acknowledged it to be his last will and testament." The memory of the witnesses as to the particulars of the transaction was very imperfect, but both united in declaring that the facts stated in the attestation clause were true, or that they would not have signed it. *Held*, that the will should be admitted to probate.

That it seemed very certain that the signature of the testator was in full view of the witnesses, and that the fair inference was that he signed it in the presence of the witnesses.

*Lewis v. Lewis* (11 N. Y., 220) distinguished.

That if the will was signed before its attestation by the witnesses, the exhibition of the will, and of the testator's signature attached thereto, and his declaration to the witnesses that it was his last will and testament, and his request to the witnesses to attest the same, were a sufficient acknowledgment of the signature and publication of the will.

*Matter of Phillips* (98 N. Y., 267) followed.

APPEAL from a decree of the surrogate of Rockland county, refusing to admit to probate a paper purporting to be the last will and testament of Edwin B. Hunt, deceased.

*Daniel W. Guernsey* and *W. Farrington*, for the proponents,  
appellants.

*James Armstrong*, for Mary S. Baker, contestant, respondent.

BARNARD, P. J.:

Everything surrounding the execution of the will proposed for probate shows good faith and freedom from any evil influence whatever. The deceased was a clerk in Brooklyn, in the employment of Sleight & Petty. The will was drawn by the testator himself, and was witnessed by his employers. The attestation clause is not full, but is as follows: "We, the undersigned, witnesses, have signed the within, in the presence of each other and of the testator, who acknowledged it to be his last will and testament."

The memory of the witnesses is very imperfect of the particulars of the transaction, but both unite in the declaration that the facts stated in the attestation clause were true, or that they would not have signed it. The will was then produced before the witnesses, either signed or unsigned, and attested by the witnesses. If it was signed in the presence of the witnesses the attestation clause is sufficient.

The learned surrogate puts his decision upon the fact that it was signed before the witnesses were asked to attest it, and then rejects the will on the authority of *Lewis v. Lewis* (11 N. Y., 220). It is true that the statute either requires that the signature be made in the presence of the witnesses, or that it be acknowledged. The acts are separate and distinct, and a failure in either will call for a rejection of the will. In the case of *Lewis v. Lewis* the paper was so folded as that the witnesses could not see the signature, and the publication was "I declare the within to be my will and deed."

It seems very certain in this case that the signature of the testator was in full view of the witnesses, and the fair inference is that he signed it in the presence of the witnesses. The attestation clause is entirely consistent with its execution in the presence of the witnesses. If the will was signed before its attestation by the witnesses the will should be admitted to probate. "The exhibition of the will and of the testator's signature attached thereto, and his declaration to the witnesses that it was his last will and testament, and his request to the witnesses to attest the same, were, we think, a sufficient acknowledgment of the signature and publication of the will." (*Matter of Phillips*, 98 N. Y., 267.) The same court, in *Matter of Higgins* (94 N. Y., 554), express the same opinion

in respect to the testimony of one of the subscribing witnesses to the will.

The decree rejecting the will should be reversed and the record remitted to the Surrogate's Court, with direction to admit the will to probate. Costs to appellants out of the estate.

PRATT, J., concurred.

Decree of surrogate reversed and proceedings remitted to surrogate to admit will to probate, with costs to the appellants out of the estate.

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MARY E. ROGERS AND OTHERS, RESPONDENTS, v. GEORGE ANSON, APPELLANT.

*Damages — examination of witnesses as to the amount thereof — what questions are allowable.*

Upon the trial of this action, brought to recover damages done by cattle trespassing upon the plaintiffs' premises and injuring the vines, currant bushes and fruit trees upon them, one of the plaintiffs, after testifying to the breaking of the limbs of the trees and the destruction of the vines and shrubs, was permitted, against the defendant's objection and exception, to answer the questions, "What was the value of the trees? what was the amount of damage you saw done them," by saying, "Well, \$200."

*Held*, that no error was committed in allowing the question to be put and answered.

Another witness, who had given with great minuteness the items of injury and stated that he knew the value of the lands, was asked and allowed to answer what the amount of damage was.

*Held*, no error.

Another witness, who had stated the injury, on being asked as to its extent, replied: "If it was on my own land, I would hate to have it done for a couple of hundred of dollars."

*Held*, that the court did not err in refusing to strike out the answer.

APPEAL from a judgment of the County Court of Dutchess county, entered upon the verdict of a jury in favor of the plaintiffs.

A. M. & G. Card, for the appellant.

W. C. Haight, for the respondents.

BARNARD, P. J. :

This was an action of trespass upon lands. The parties are adjoining owners, and the damage alleged to have been done was done by cattle. The plaintiffs' premises had vines, currant bushes and fruit trees on it. The principal question presented was as to the proof of damage. One of the plaintiffs, Hannah Northrop, testified as follows: "The limbs were broken down, some of the trees were broken down to the roots, the quince bushes were entirely broken off, and my cranberries (they were of large kind) they were destroyed, and the bigger trees—the limbs were broken off pear trees, apple trees, cherry trees and all; I had then about 100 apple trees, eight cherry trees, six pear, and great limbs were broken off them; I had an ornamental tree that was also torn to pieces, torn from the ground; that was worth \$500; grape arbor was also destroyed; I had terraces along them, they were also destroyed so it had to be rebuilt." The plaintiff was then permitted to put this question: What was the value of the trees—what was the amount of damage which you saw done them? A. Well, \$200. This question did not call for an opinion merely. The value of property is a fact and not an opinion, and the double question merely called for the value of the things specifically mentioned by the witness as in a greater or less degree injured. (*McCollum v. Seward*, 62 N. Y., 316; *Seymour v. Fellows*, 77 N. Y., 178.)

The other instances where exception was taken to the question of damages were not erroneous. The witness, J. H. Northrop, after giving with great minuteness, the items of injury, and after stating that he knew the value of the lands, was asked what was the amount of damage done. Under the case of *Argotsinger v. Vines* (82 N. Y., 308) the damage was the difference between the land before the injury and the land after it, and the question called for that only. The question put to the witness Rogers is sustainable for the same reason. The witness Cary gave particularly the injury he had seen, and that he made up his damages from that only. No error was committed in refusing to strike out the answer given by the witness Cable. He had stated the injury, he said, and when asked as to its extent, replied as follows: "If it was on my own (land) I should hate to have it done for a couple of hundred dollars." This was responsive to the question. The only objection to it is the insertion

of that part of the answer which refers to his own land. It does not appear that the witness intended to make a different estimate by reason of that answer. It was a mannerism of the witness to convey the idea that the damage done was \$200. The damages are not excessive. The injury was considerable. There is some evidence that it amounted to \$200. When a lesser sum is given by a witness it appears that he did not include all, but only such portions as he had brought to his notice. The question is one peculiarly for a jury, and the verdict thereon should stand.

Judgment affirmed, with costs.

PRATT, J. :

There are no errors of law shown by the record, and we do not think the verdict can be called excessive. The jury, upon the first trial, rendered a verdict for \$200, which should be allowed some weight upon the question of excessive damages. The trespass was deliberate and continued, and the evidence required substantial damages. The charge of the court was as favorable as defendant had any right to expect.

The judgment should be affirmed, with costs.

Judgment affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
JAMES J. HAYES v. THOMAS CARROLL, AS THE COM-  
MISSIONER OF POLICE AND EXCISE OF THE CITY OF BROOKLYN.

*Dismissal of members of the police force of Brooklyn—1873, chapter 863, section 14, title 11, as amended by chapter 457 of 1881.*

*Certiorari* to review the action of the respondent, the Police Commissioner of the City of Brooklyn, in dismissing the relator, a member of the police department of that city, upon a charge of an unprovoked assault upon a citizen while the relator was off duty.

*Held*, that the relator was properly dismissed for a violation of rules of the department, which provided that the policemen should be at all times subject to its rules, and prohibited any policeman from willfully abusing or ill-treating a citizen.



CERTIORARI to review the action of the respondent in removing the relator from the position of patrolman in the police department of the city of Brooklyn.

The charge was misconduct. The specification of the charge alleged that on the 29th day of January, 1886, the relator assaulted one Robert Cullen. The evidence on the trial was conflicting, Cullen claiming that the assault was unjustifiable and the relator alleging that he struck Cullen in self-defense. It is conceded that the alleged assault was committed on the relator's day off; that he was not in uniform. It is claimed on the relator's behalf that he was not amenable to the respondent for his conduct when off duty.

*Edward F. O'Dwyer*, for the relator.

*F. A. McCloskey*, for the respondent.

BARNARD, P. J.:

The relator was a member of the police department of the city of Brooklyn. The respondent is the police commissioner and, by chapter 863, Laws of 1873, title 11, section 14, as amended by chapter 457, Laws of 1881, has power to dismiss from the force a policeman who violates the rules of the department. He has also power to dismiss for conduct unbecoming an officer. The relator was charged with an unprovoked assault upon a citizen while he, the policeman, was off duty. He was tried for this offense and dismissed.

It is one of the rules that no policeman shall willfully abuse or ill-treat a citizen. (Rule 136.) The policeman is at all times subject to the rules. (Rule 145.) Both rules are necessary and proper. The policeman is to protect the public. He must not be a brawler and fighter either when on or off duty, for his efficiency depends upon a public respect for his office and a confidence in the acts and deportment of the officer. The commissioner thus had jurisdiction over the charge, and he obtained jurisdiction over the officer by his appearance, without objection, to answer the written charge. (*McCormick v. Penn. Cent. R. R. Co.*, 49 N.Y., 303.) The charge is sufficiently explicit. Even at common law the very words of the statute or rule need not be used. If the substance of the charge be expressed it is good pleading. These proceedings are not such as

call for the strict common-law rules either of pleading or trial. (*People ex rel. McCarthy v. Police Comrs. of N. Y.*, 98 N. Y., 332; *People ex rel. Flanagan v. Police Comrs. of N. Y.*, 93 id., 97.) The issue of fact, if the evidence be merely conflicting, does not call for a reversal for that reason. (*People ex rel. Hart v. Fire Comrs.*, 92 N. Y., 358.) The evidence in this case supports the conclusion of the commissioner.

Judgment affirmed, with costs.

DYKMAN, J., concurred.

Commissioner's order affirmed, with costs.

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AUGUSTUS F. FERRIS, APPELLANT, v. JOHN F.  
PLUMMER, RESPONDENT.

*Contract for the sale of real estate — an objection to the title, based on a decision of the General Term of the Supreme Court, will relieve the purchaser from accepting the title.*

The court will not compel one, who has entered into a contract for the purchase of real estate, to specifically perform his contract when his refusal to complete the purchase is based upon an objection which is sustained by a decision of the General Term of this court.

So long as no adverse decision has been made by a controlling authority, such an objection cannot be considered captious or unreasonable.

APPEAL from a judgment in favor of the defendant, entered in Kings county upon an order dismissing the complaint, with costs.

The action was brought to compel the defendant to specifically perform a contract for the purchase of certain real estate, to which the plaintiff acquired title through a deed from the sheriff of Kings county, made under and pursuant to a judgment of foreclosure and sale, entered in an action brought in the Supreme Court, Kings county, by William I. Preston against William H. Algie, to foreclose a mortgage for \$5,000 on said property, dated October 18, 1884.

On February 11, 1885, William I. Preston, the plaintiff in said action, obtained from said court an order directing that the service of the summons therein be made upon the defendant Algie, the mortgagor and only defendant, under and pursuant to sections 435-437

of the Code of Civil Procedure, and on February 12, 1885, said service was duly made as required by said sections and order. On February 16, 1885, the affidavit of such service was duly filed in the Kings county clerk's office. A mortgage, a judgment and mechanics' liens, claimed by the defendant to be liens or incumbrances on said property, were filed or recorded subsequent to December 17, 1884, the date of the filing the notice of *lis pendens* in the action brought to foreclose the mortgage.

The defendant claimed that these incumbrances, though junior in date to the filing of the notice of *lis pendens*, were not barred thereby, or by the foreclosure proceeding, for the reason that those lienors were not parties to the suit and no personal service was made upon the defendant therein, but he was brought in by a substituted service and subsequently appeared; that such substituted service did not render the notice of *lis pendens* effectual. This was the only question raised and passed upon at the trial.

Mr. Justice CULLEN, before whom the case was tried at Special Term, on account of a decision of the First Department at General Term, in the case of *Bogart v. Swezy* (26 Hun, 463), gave judgment for the defendant.

*B. F. Tracy*, for the appellant.

*Booraem & Hamilton*, for the respondent.

PRATT, J. :

The enforcement of specific performance always rests in the sound discretion of the court; and when it is made to appear that a reasonable doubt exists as to the validity of a title, the court will not compel a purchaser to take a title, but will leave the vendor to his action for damages.

In the case at bar we think the decision in *Bogart v. Swezy* (26 Hun, 463) raises enough doubt as to the validity of the title, so that specific performance should not be required. We cannot distinguish between the principle of that case and the case now presented. It has been said that a decision by a court of co-ordinate jurisdiction, adverse to the principle on which the title rests, will raise sufficient doubt; that specific performance will not be decreed though the court thinks the decision wrong. (Fry on Specific Per-

formance [3 Am. ed.], 433.) It would, therefore, not be profitable for us to discuss whether the decision in *Bogart v. Swezy* correctly states the law. We are constrained to say that an objection, based on a decision of a General Term of this court, cannot be considered captious or unreasonable on the part of a purchaser. So long as no adverse decision has been made by controlling authority, the holder of the title might find his market injured by the objection now raised. The decision at Special Term not to compel performance was, therefore, right. Costs were, however, in the discretion of the court and we think should not have been given.

The judgment below will be modified by striking out the costs; no costs of appeal.

Present — BARNARD, P. J., DYKMAN and PRATT, JJ.

Judgment modified, so far as to deny costs of trial, without costs to either party on appeal.

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JOHN B. HOPKINS, APPELLANT, v. FRANKLIN J. LOTT,  
AS ADMINISTRATOR OF SARAH E. LOTT, DECEASED,  
RESPONDENT.

*Reference of a disputed claim against the estate of a deceased person — right to costs and disbursements and an extra allowance.*

A claim for \$1,000 for damages for breach of a covenant of quiet enjoyment contained in a lease given by the defendant's intestate to the plaintiff, having been presented to and rejected by the defendant, was, by the consent of both parties and with the approval of the surrogate, referred. The referee reported in favor of the plaintiff for six cents damages. The defendant paid the referee's fees, upon the refusal of the plaintiff to do so, took up the report and moved for and obtained an order confirming the same and awarding to the defendant his costs, disbursements and an extra allowance.

*Held*, that the order was right and should be affirmed.

APPEAL from an order made at the Kings county Special Term and entered in Queens county.

The respondent's intestate leased to the appellant a farm for a term of seven years, but after the appellant had occupied it for a part of that period he was evicted by the owners of the para-

mount title. The appellant presented a claim against the lessor's estate for \$1,000 damages for such eviction, which having been disputed was referred by consent, pursuant to the statute, to a referee to determine. The referee found in favor of the appellant six cents damages. On the motion to confirm this report the Special Term, by the order appealed from, denied disbursements to the appellant and awarded costs and an extra allowance to respondent.

*Henry A. Monfort*, for the appellant.

*Joseph M. Pray*, for the respondent.

PRATT, J. :

This was a matter arising upon a claim by plaintiff against the estate of Sarah E. Lott, deceased, which was presented to and rejected by the defendant administrator, who at the same time offered to refer, and the claim was accordingly referred on consent of both parties and with the approval of the surrogate.

The claim was for \$1,000 damages for breach of a covenant of quiet enjoyment in a lease. The referee reported that plaintiff was entitled to six cents damages. The referee's fees were sixty dollars, which plaintiff refused to pay and defendant took up the report and moved at Special Term for costs. The court rendered judgment for the plaintiff for six cents damages, and in favor of the defendant for costs and disbursements.

It seems to be settled that this proceeding is not an action but is a special proceeding. (*Mowry v. Peet*, 88 N. Y., 456; *Roe v. Boyle*, 81 id., 305.) We think the order made below was right. The Revised Statutes, under which the reference was had, provides that the "court may adjudge costs as in actions against executors and administrators." Then comes the provision of the Code of Civil Procedure (§ 3246) as follows: "In an action brought by or against an executor or administrator in his representative capacity, \* \* \* costs must be awarded as in an action by or against a person prosecuting or defending in his own right."

On the question of costs the defendant here was the prevailing party. In this special proceeding the costs are to be adjudged as in an action prosecuted or defended by a person in his own right. The Code of Civil Procedure was intended to provide a complete

system upon the subject of costs (see secs. 3246, 3228, 3229, 3230 and 3256), which seem to cover the case in hand. The confusion seems to have arisen from the fact that the Code of Civil Procedure refers to actions when treating of costs, but when it is seen that this particular proceeding is assimilated to an action in regard to costs there seems to be no difficulty in the question.

This view is in consonance with the general purpose of the legislature in allowing costs, which is to make the burden of litigation fall upon the party who causelessly invokes it.

Order affirmed, with costs.

BARNARD, P. J., concurred; DYKMAN, J., not sitting.

Order affirmed, with costs and disbursements.

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JOSEPH D. MULDOWNNEY, RESPONDENT, v. THE MORRIS  
AND ESSEX RAILROAD COMPANY, APPELLANT.

*Pleadings—right of the plaintiff to any relief he may be entitled to upon the case made—when one tenant in common may recover, for use and occupation, from a co-tenant who excludes him from the possession of the premises.*

The plaintiff alleged in his complaint that, in 1857, John Dunn, of Morris county, New Jersey, died intestate, leaving him surviving his widow, Margaret, and two children, John J. and May, and being then seized in fee of a parcel of land situate at Madison, in New Jersey, which is described in the complaint. In 1873, May Dunn, the daughter, was married to the plaintiff, of which marriage a child was born in December, 1875, which died in July, 1876. The daughter died intestate in September, 1876. In 1878, Margaret, the widow of John Dunn, and her son, John J., conveyed the said premises to F. S. Lathrop, who, in January, 1879, conveyed them to the defendant, which has ever since been in the quiet and undisputed possession thereof; that the said premises, when conveyed to the defendant, were wholly vacant and unimproved, but were, at the time this action was brought, covered by a depot building erected and occupied by the defendant for the purposes of its business; that the plaintiff did not, prior to the summer of 1884, know that he had any interest in the premises. The relief demanded was that the defendant should account to the plaintiff for the rents, issues and profits of the premises and pay to the plaintiff the rental value of his interest in the premises from the date of the conveyance by Lathrop in January, 1879.

*Held*, that an objection made by the defendant that, as the defendant itself occupied the premises, it could not be required, under the facts stated in the

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complaint, to respond in rent or to render an account was properly overruled, as it was competent for the court to permit the plaintiff to take any judgment consistent with the case made by the complaint and embraced within the issue. The court found that the plaintiff had title in the premises as alleged; that the defendant had at all times refused, and does refuse to allow the plaintiff to use and enjoy his interest in the premises, or to let him into possession or to pay him any sum for use and occupation; that it received the total rental value of said premises since January, 1879, and more than its share; that it occupied the whole of said premises in such a manner that plaintiff could have no beneficial use thereof, and that no one, as they are now situated, can use them except a railroad for railroad purposes, and that it was impossible to set off a third or a half, or any fractional part thereof, and that there could be no joint occupation of them; a judgment was directed in favor of the plaintiff for an amount adjudged by the court to be the value of the plaintiff's one-third interest of the use and occupation of the said premises from January 7, 1879, to January 7, 1886.

*Held*, that the judgment should be affirmed.

*Woolever v. Knapp* (18 Barb., 265); *Dresser v. Dresser* (40 id., 800); *Wilcox v. Wilcox* (48 id., 337); *Joslyn v. Joslyn* (9 Hun, 383), and *Roseboom v. Roseboom* (15 id., 809) distinguished; *McCabe v. McCabe* (18 id., 153) approved.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

The action was brought by the plaintiff, who claimed to have an estate, as tenant by the curtesy, in property which the defendant used and occupied.

The plaintiff asked "the judgment of the court that the defendant account for the use and occupation of plaintiff's estate and interest in the hereinbefore described premises since the 7th day of January, 1879, to the 7th day of January, 1886; that the court may ascertain and determine the rights, interests and estates of the plaintiff and defendant in and to the premises described in the complaint, and the proportions in which plaintiff and defendant are entitled to share in the rents, issues and profits thereof, and plaintiff's just proportion of the rents, issues and profits of said described premises during said time; that plaintiff may recover of defendant his just proportion of the rents, issues and profits of said premises, and the amount found due on said accounting, with interest, as the court shall determine, and that plaintiff may have such other and further relief as to the court shall deem equitable and just."

The defendant called no witnesses, but moved, after the plaintiff had stated his cause of action, and after he had closed his case, to

dismiss the complaint on the ground that an action for an accounting would not lie in favor of a tenant in common against his co-tenant for the use and occupation by such co-tenant of the entire premises held in common. The court denied the motion and directed a judgment in favor of the plaintiff.

*Hamilton Odell*, for the appellant.

*Frank Hasbrouck*, for the respondent.

PRATT, J. :

This is an appeal from a judgment entered against the defendant upon a decision at Special Term, and the case discloses the following facts: John Dunn, of Morris county, New Jersey, died in 1857, intestate, and leaving him surviving his widow, Margaret Dunn, and two children, John J. and Mary. At the time of his death he was seized in fee of a parcel of land situated at Madison, in New Jersey, which is described in the complaint, and which contained 2,691 square feet. The said premises descended to his children "as equal tenants in common, subject to the dower rights of their mother."

In 1873 Mary Dunn, the daughter, was married to the plaintiff. A child was born of the marriage in December, 1875, which died in July, 1876. Mrs. Muldowney died intestate in September, 1876. In 1878 Margaret Dunn, the widow, and her son, John J., conveyed the said premises to F. S. Lathrop, and in January, 1879, Lathrop conveyed them to the defendant, who has ever since been in quiet and undisputed possession thereof, "except that plaintiff has asserted and claimed an interest therein from about two years ago." The said premises, when conveyed to the defendant, were wholly vacant and unimproved, but are now covered in part by a depot building, erected and occupied by the defendant for the purposes of its business.

It was not until the summer of 1884 "that plaintiff discovered and knew that he had an interest in the said premises, and plaintiff did not notify the defendant that he had or claimed to have any estate or interest in the said premises until during the summer of the year 1884." It is not claimed that the defendant had any prior knowledge or notice of the plaintiff's said estate or interest. The plaintiff's demand upon defendant was not that he should be let



into possession, but that defendant should pay him the rental value of his interest in the premises from the date of the conveyance by Lathrop to defendant in January, 1879. The defendant's first objection is that the form of action is improper, that it cannot be required to respond in rent or for an accounting, etc., under the facts stated in the complaint.

It is plain that if the plaintiff can have no relief in this action he is without remedy, for he has stated all the facts constituting his cause of action, and answer has been interposed and the issues tried. To so state his facts was all the law required of him, and an answer having been filed and case tried, it was competent for the court to permit the plaintiff to take any judgment consistent with the case made by the complaint and embraced within the issue. The object is to do complete justice between the parties when they both have an opportunity to be heard, irrespective of any theories the parties may entertain when they file their pleadings.

Under the present system of Code pleading the plaintiff must state the facts and pray for such relief as he *supposes* himself entitled, but he is not to be turned out of court because he prays for too much or too little, or for wrong relief. In this case the plaintiff prayed for enough, but if he prayed for too much it is of no consequence.

The court below has found title in the plaintiff, as alleged, and that the land is in the exclusive possession of the defendant. "That the defendant has at all times and does refuse to allow the plaintiff to use and enjoy his interest in the premises, to let him into possession, or to pay him any sum for use and occupation." That defendant occupies the whole of said premises in such a manner that plaintiff can have no beneficial use, and that no one, as it is now situated, can use it except a railroad, for railroad purposes, and that it is impossible to set off a third or a half or any fractional part, and that there can be no joint occupation of said premises. The court has further found that defendant has received since January, 1879, the total amount of rental value of said premises, and more than its share.

If these findings are sustained the judgment ought to be affirmed, but if we assume that the findings of fact are not all sustained by the proof, we still think there is enough in the undisputed facts of

the case to entitle the plaintiff to hold the judgment he has obtained. It must be conceded that the court had jurisdiction of the parties and the subject matter involved. The answer simply denies, upon information and belief, that plaintiff has any interest in the premises, and sets up the title under which it holds. The answer admits, by not denying it, that defendant has never allowed, and will not allow, plaintiff to occupy any part of said premises, and have never paid him any rent for the use of said premises.

The situation, as claimed by the defendant, is as follows: The plaintiff cannot sue in ejectment, as the defendant's occupation is plaintiff's occupation. (Code of Civil Pro., § 1515.) That he cannot maintain partition as his title is simply life-tenant, while the defendant owns the remainder in fee. (Code, §§ 1538, 1539.) That he cannot sue for an accounting, as the defendant has received no rents; nor for use and occupation, as there is no relation of landlord and tenant; and so the plaintiff can have no remedy whatever.

The plaintiff claims that the defendant is the owner of the whole property, subject to a right possessed by the plaintiff, in the nature of an annuity charged thereon, which the court has fixed at forty-one dollars and sixty-six cents. But, whatever may be the technical relation of the parties, the plaintiff has made out a case entitling him to relief. It is not fatal to his claim that no precise authority can be found in this State authorizing such a judgment.

It was, under the common law, the practice in England when a suitor desired redress for a wrong for which there was no established remedy to apply to the proper court to frame a writ that would give him a just remedy, and that form of action known as "action upon the case" was adopted to meet a large number of such cases. Again, courts of equity were established to afford a remedy where the technical rules of law were insufficient to administer justice. The Supreme Court of this State, under the Constitution, has "general jurisdiction in law and equity," and exercises, under such rules of practice as the legislature has established, the common law and chancery powers exercised in this State prior to the adoption of the Constitution of 1846.

The plaintiff is properly before the court, its jurisdiction is not questioned, and no technical rule of practice forbids its doing justice between the parties. It is a clear wrong to deprive the plaintiff

of the enjoyment of his property without compensation, and to deny the power of the court to give the plaintiff relief is to challenge its power to do justice. But we think this case can be relieved of all embarrassment by holding that the plaintiff and defendant are tenants in common, and that the action can be maintained under section 1666 of the Code of Civil Procedure—"tenants in common are such as hold lands or tenements by several and distinct titles, but occupy in common, the only unity recognized between them, being that of possession." They are accountable to each other for the profits of the estate, and if one turns another out of possession an action of ejectment will lie against him. They may also have reciprocal actions for waste against each other. (2 Black. Com., 191.) The action of account now lies when one tenant has received "more than his just proportion" of the rents. (Code, § 1666.)

Whether an accounting will lie where the tenant has not received rent has never been decided by the Court of Appeals, but the Supreme Court has, in several instances, decided that such an action cannot be maintained, but the cases are all easily distinguished from the parent case and cannot be regarded as authority for the decision of the case at bar. The leading case is *Woolever v. Knapp* (18 Barb., 265), which was decided by MASON, Justice, in 1854. The decision of the case is put entirely upon the similarity of our statute to the English statute; and the construction put upon the latter by the English courts is adopted as the construction of our statute.

The language of the reasoning of the English cases is adopted by Judge MASON as follows, viz.: "The effect of allowing an action in such a case would be that one tenant in common, by keeping out of actual occupation of the premises, might convert the other into his bailiff; in other words, prevent the other from occupying them except upon the terms of paying him rent." To this it may be replied, why not, if he received more than his share? If he kept his tenant out and received the whole benefit, why not pay his tenant his just proportion?

The case, however, decides that the statute applied only to cases where the defendant received rent, and not to cases where he solely occupied the premises. The cases holding the same doctrine are *Dresser v. Dresser* (40 Barb., 300); *Wilcox v. Wilcox* (48 id., 327);

*Joslyn v. Joslyn* (9 Hun, 388); *Roseboom v. Roseboom* (15 id., 309). These cases all cite and follow *Woolever v. Knapp*, and none contain any new reasoning upon the subject. These cases can all be distinguished from this case: First. The joint or common premises in every case were farming lands *open to the occupation* and free to the enjoyment of all the owners. Second. The owners in each case were seized of parent *estates of co-ordinate rank*. Third. In all the cases there was a failure of proof of demand on the part of the complaining tenant to be allowed to enjoy the premises.

In *Woolever v. Knapp* the question is stated to be "whether one tenant in common who possesses the entire premises without any agreement with the others as to his possession, or *any demand on their part to be allowed to enjoy the premises with him*, is liable to account."

In *Dresser v. Dresser* it is said: "For aught that appears, the defendant might at all times have occupied the premises jointly with the plaintiff, if he had chosen to do so."

In *Roseboom v. Roseboom* it is said: Defendant "might remain in the occupancy of the whole so long as he did nothing to prevent his co-tenants from occupying with him." In all the cases just decided it may also be added that the equities were against the party claiming an account for rents.

Here the defendant excluded the plaintiff and chose to occupy the premises, thus, by the use and enjoyment of the premises, receiving the rent. The benefit or rent thus received the court has fixed, and the law assumes that defendant is the plaintiff's bailiff to this amount. If the defendant elects to receive rent by the use of the premises, what reason is there for holding that he shall not pay his co-tenant his just proportion.

This case is somewhat analogous to that of *McCabe v. McCabe* (18 Hun, 153). That was an action of partition between tenants in common. The defendants in their answer asked that the plaintiff account for his sole possession of the premises, and for stone quarried therefrom. With regard to quarrying stone, the court says: It "is a very different act from the occupation of the land or from its cultivation." The judge further says: "It may be necessary to adhere to the rule that for mere occupancy the co-tenant shall not be liable to account; but there is no reason to extend that rule to a

case where the co-tenant actually consumes or takes off and disposes of a part of the property held in common." In the case at bar the defendant has appropriated the whole of plaintiff's to its own use.

We think the findings of fact are abundantly sustained by the proofs, and that the facts do not bring the case strictly within the principle laid down in *Woolever v. Knapp*, and that the judgment is right, unless the rents should have been computed from the summer of 1884, when the demand was made by the plaintiff to be let into possession, instead of the date of January 7, 1879. It is evident that a demand would have been futile, and that a failure to make it has not misled the defendant or put it in any worse condition in respect to the premises.

The judgment should be affirmed, with costs.

DYKMAN, J., concurred ; BARNARD, P. J., not sitting.

Judgment affirmed, with costs.

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STEPHEN McCARRAGHER, RESPONDENT, v. WILLIAM GASKELL AND OTHERS, APPELLANTS.

*Negligence — liability of all the members of a firm for the negligence of one of them — when a disputed question of fact should be submitted to the jury.*

This action was brought by the plaintiff, a journeyman blacksmith, against the defendants, his employers, who were boss blacksmiths, to recover damages alleged to have been occasioned by reason of their negligence. While he was engaged in welding a foot upon a stanchion, both being made of iron, the defendant Greenlie, standing to the plaintiff's left and rear, suddenly and without warning threw what is called "cherry welding compound," a mixture of borax and iron filings, upon the surface of the iron, whereby a sputtering-flux was formed and one of the liquid particles flew into the plaintiff's eye, so injuring it that he has lost the sight of it. Upon the trial the evidence was conflicting as to whether or not suddenly throwing this compound upon hot iron without warning was unusual and calculated to produce such an injury.

*Held*, that the question was properly submitted to the jury, as the evidence was such that reasonable men might well differ as to the inferences to be drawn from it.

That a verdict in favor of the plaintiff would not be disturbed.

That an exception to the ruling that the copartners of Greenlie could be held liable for his negligent or careless act was not well taken.

APPEAL from a judgment, entered upon the verdict of a jury at the Kings County Circuit, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

*Estes & Barnard*, for the appellants.

*James D. Bell*, for the respondent.

PRATT, J.:

This is an appeal from a judgment entered upon a verdict rendered in favor of the plaintiff for \$1,000, and also from an order dated November 18, 1885, denying defendants' motion for a new trial upon the minutes in an action for negligence.

On October 10th, 1884, plaintiff, a journeyman blacksmith, was in the employ of the defendants, then boss blacksmiths in New York city. He was engaged in welding a foot upon a stanchion, both being of iron, when the defendant, Greenlie, standing to plaintiff's left and rear, suddenly and without warning, threw what is called "cherry welding compound," a mixture of borax and iron-filings, upon the surface of the iron, whereby a sputtering-flux was formed and one of the liquid particles flew into plaintiff's eye, so injuring it that he has lost the sight of it.

The defendant strenuously contends that the proof shows that the injury received by the plaintiff was one incident to the employment and of which he assumed the risk. It is true, he assumed the ordinary perils which belonged to the work itself, or naturally grew out of it; but there was evidence tending to show, and the jury have so found, that suddenly throwing the compound described upon hot iron, without warning, was unusual and well calculated to produce such an injury. Had a proper warning been given, it is possible the plaintiff might have taken some precaution to avoid the injury. But defendant claims that the proof shows that sparks are liable at all times to fly when welding iron, and that it is not established that the using of the compound was the cause of the accident; and even if it was, the defendant had a right to use it, as its use was so common and natural, that no warning was required to be given. The difficulty with this contention is, that the jury have found against it upon disputed facts, and the verdict is not so manifestly

against the weight of evidence as to justify setting it aside. We think there is evidence from which the jury were authorized to find that plaintiff was injured by reason of the compound having been used in the manner described.

This question was properly submitted to the jury, as the evidence was such that reasonable men might well differ as to the inferences to be drawn from it. (*Thurber v. Harlem, etc., R. R. Co.*, 60 N. Y., 331; *Stackus v. N. Y. C. and H. R. R. Co.*, 79 id., 464; *Wait v. Agricultural Ins. Co.*, 13 Hun, 371.)

To warrant a refusal to submit a case to a jury, it must appear, after conceding that the testimony for plaintiff is true, and after giving him the benefit of all legitimate inferences therefrom, that a verdict in his favor cannot be upheld.

The acts of defendant, Greenlie, were shown to be unusual and unexpected, and were such as justified an inference by the jury, if they believed the evidence introduced by the plaintiff, that the defendant did not act with due care.

The charge was full, fair and unexceptionable, and the damages cannot be said to be excessive.

The exception to the ruling that the copartners of Greenlie could be held liable, was not well taken. (*Shearman & Red on Neg.*, § 39; *Parsons on Partnership* [3d ed.], chap. VI, p. 163; *Stroher v. Eltyny*, 97 N. Y., 102.)

We have examined the several exceptions taken upon the trial and to the charge, but find none exhibiting such error as to warrant the granting of a new trial.

Judgment and order appealed from affirmed, with costs.

Present—BARNARD, P. J., DYKMAN and PRATT, JJ.

Judgment and order affirmed, with costs.

LEWIS H. SMITH, RESPONDENT, v. THE GOLD AND STOCK  
TELEGRAPH COMPANY AND THE WESTERN  
UNION TELEGRAPH COMPANY, APPELLANTS.

*Duty of a corporation, engaged in a public business, to serve all impartially — when regulations established by it will be held void as unreasonable — when an injunction will be granted although damages might be recovered in an action at law.*

In this action, brought by the plaintiff, a broker, to restrain the defendant, the Gold and Stock Telegraph Company, from removing from his office a "stock ticker," which had been placed therein by it under a contract by which the plaintiff was required to pay a rental of ten dollars per month, a temporary injunction was granted restraining the defendant from so doing during the pendency of the action.

*Held*, that the order should be affirmed.

That the defendant, being engaged in a business public in its nature, it must serve the public impartially and render equal service to all those who complied with such reasonable regulations as might be prescribed by it.

By the contract under which the ticker was put in the plaintiff's office, he agreed that the defendant might discontinue its service, without notice, whenever, in its judgment, the plaintiff had violated any of the conditions of the contract.

*Held*, that this was not a reasonable regulation and afforded no defense to this action, nor was the fact that an action at law for damages would lie in the plaintiff's favor a defense thereto.

APPEAL from an order made at the Kings County Special Term continuing a temporary injunction during the pendency of this action.

The action was brought by the plaintiff to restrain the defendants from removing from his office a stock "ticker" or reporting instrument maintained and operated by the defendant, the Gold and Stock Telegraph Company, and from doing or failing to do any act which would in any way interfere with the receipt by plaintiff of the quotations of the New York Stock Exchange.

The complaint, in addition to the formal allegations, avers that the Gold and Stock Telegraph Company placed one of its instruments in plaintiff's office, in consideration of which plaintiff agreed to pay a rental of ten dollars per month. By one of the clauses of the contract the plaintiff agreed that the company might forthwith discontinue its service, without notice, whenever, in its judgment, any breach of the conditions of the contract should have been made by him. The complaint averred that irreparable damage to plain-



tiff would ensue upon a discontinuance of the quotation service and the removal of the stock "ticker," and that the defendants threaten and intend such discontinuance and removal.

*Dillon & Swayne*, for the appellants.

*J. W. Hawes*, for the respondent.

PRATT, J. :

It has been settled for hundreds of years that an inn-keeper is bound to receive the guest who applies for accommodations. So is it well settled that a common carrier must receive and transport goods offered him for that purpose impartially and without discrimination between parties applying.

These obligations do not rest on contract, but on the ground that when one is engaged in a business, public in its nature, he must, if public policy requires, serve the public impartially. The occasions for the application of this familiar principle are by no means diminished by the formation of corporations which carry on a great part of the business of the country. And in applying these rules to a corporation, the charter of the corporation is not solely to be consulted in arriving at the measure of its obligations to the public. When the charter provides that a corporation shall engage in some specified public occupation, no doubt a reference thereto will be an easy way to establish its obligations to perform such service. But we do not accede to the doctrine that when engaged in a business concerning the performance of which its charter is silent, a corporation is freed from the obligations which ordinarily attach to a natural person engaging in such occupation.

Had defendants in the present action answered that collecting and distributing commercial intelligence being foreign to the objects for which they are incorporated, they had in consequence abandoned that branch of their business and withdrawn their "tickers" from all offices except the plaintiffs, we should not hold that they could be compelled to carry on the business for his benefit. But so long as collecting and supplying quotations is carried on by them, as it is conceded to be at present, they should render equal and impartial service to those who comply with reasonable regulations.

What regulations are reasonable may not in all cases be easy to

determine. But there need be no hesitation in saying that the clause in their contract permitting them to discontinue the service when *in their judgment* a breach of conditions has been had, is not a reasonable regulation and affords no defense to this action. No man can be judge in his own case, and to justify defendants in refusing to perform service, there must be a reason that the court can pronounce sufficient.

Nor is it a defense to the action that an action at law for damages would lie in plaintiff's favor. It is easy to see that accurate proof of the amount of damage sustained would be impracticable; and where a right is clear, the fact that a defendant is able and willing to pay for the liberty of infringing upon it, is not a very satisfactory ground for refusing an injunction.

The order continuing the injunction must be affirmed, with costs and disbursements.

Present — BARNARD, P. J., DYKMAN and PRATT, JJ

Order affirmed, with costs and disbursements.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
PATRICK J. CARLIN, APPELLANT, v. THE BOARD OF  
SUPERVISORS OF KINGS COUNTY, RESPONDENT.

*Right of a board of supervisors, compelled to advertise for proposals and to award the contract to the lowest bidder, to reserve a right to reject bids—1884, chap. 280, sec. 8.*

Section 8 of chapter 280 of 1884, providing for the purchase of a county farm and the erection of buildings thereon by the board of supervisors of Kings county, directs that whenever the plan and specifications shall be approved by the said board of supervisors "*it shall advertise, as now provided by law, for proposals for the erection of the buildings and improvements thereby contemplated to be erected and made, and shall award the contract to the lowest responsible bidder or bidders.*" Under this act the board advertised for sealed proposals and reserved the right to reject any and all bids. The relator and others submitted proposals for separate portions of the work. A portion of the work was awarded to the relator, but a number of his bids were rejected.

Claiming that the board had no power to annex to their advertisement the condition reserving the right to reject any and all bids, the relator moved for a peremptory *mandamus* to compel the board to accept the rejected bids.

*Held*, that even if the board had no authority to annex this condition, yet, as it did in fact do it, the relator, who made his bids under the advertisement containing it, could not complain that the board exercised the right so reserved against him.

That the statute was intended to be beneficial to the county, and if such a construction could be spelled out of its terms, it was the duty of the court to be sedulous in giving it such an interpretation.

*It seems*, that the fair interpretation of the act is that when the contract is awarded it shall be to the lowest bidder.

APPEAL by the relator from an order entered in Kings county, denying a motion for a peremptory *mandamus*.

The relator claimed to be entitled to the relief sought, by virtue of the provisions of section 3 of chapter 230 of 1884, providing for the purchase of a county farm and the erection of buildings thereon by the supervisors of Kings county, which directs that "whenever any such plan, or plans and specifications, shall be approved by the said board of supervisors, it shall advertise, as now provided by law, for proposals for the erection of the buildings and improvements thereby contemplated to be erected and made, and shall award the contract to the lowest responsible bidder or bidders. But the work so to be done may be let in one or more contracts as to the said board of supervisors shall seem for the best interests of the county."

*William M. Dykman*, for the appellant.

*John B. Meyenborg*, for the respondent.

PRATT, J. :

The relator moved for a peremptory *mandamus* to compel the respondents to contract with him for sixteen cottages, two boilers and a donkey engine. Under chapter 230 of the Laws of 1884 the board of supervisors advertised for sealed proposals, and reserved the right to reject any and all bids. The relator and a number of others submitted proposals for separate portions of the work, and a portion of the work was awarded to the relator, but a number of his bids were rejected. It is claimed by the relator that the board of supervisors had no power under the statute to annex the condition to their advisement, of reserving the right to reject any bid, but having once advertised for proposals, were bound to award the contract to the lowest responsible bidder. It is not necessary to

decide whether the respondents had that power or not. The fact is that they did it, and the relator having made his bids under such advertisement, he cannot complain that they exercised the right he so conceded to them. It was the plain condition of his bid that the board might reject it, and having given his assent to such rejection, he cannot challenge their power to exercise the right. The plain object of the statute was to prevent the supervisors from arbitrarily awarding a contract to any one except the lowest responsible bidder. There is no restriction as to the form or the number of times of advertising; but the statute contemplated that there should be competition, and that the contract should in the end be awarded to the lowest bidder. The statute was intended to be beneficial to the county, and if such a construction can be spelled out of its terms, it is the duty of the court to be sedulous in giving it such an interpretation.

If the respondents had the power only to make one advertisement, and were bound to award a contract if there was only one bid, the county might be subjected to the most glaring fraud. By using the terms "the lowest bidder," the intent of the statute that there should be competition is manifest. If there is no bid with which a comparison can be made, how can it be said that a bid is the lowest; and if there is no lowest bid, how can the contract be awarded?

The return shows that the relator was the only bidder upon portions of the work where his bid was rejected. He was, therefore, not the lowest bidder within the meaning of the statute. He might be called the highest bidder as well as the lowest bidder. It seems to me that a fair interpretation of the act is that *when* the contract is awarded it shall be to the lowest bidder.

It does not seem possible that the legislature intended to take from the local law making power, *i. e.*, the board of supervisors, all discretion as to the making of contracts for the people of the county. Suppose, from accident or design, it should happen that there was but one bid, and that was for grossly exorbitant prices, could it be claimed that the board of supervisors must, nevertheless, award the contract? Such a construction would turn a statute intended for the protection of the public into an instrument of fraud and robbery.

Under the facts disclosed we think the respondents had the power and did right in rejecting the relator's proposals, and the order is accordingly affirmed, with costs and disbursements.

Present — BARNARD, P. J., and PRATT, J.; DYKMAN, J., not sitting.

Order denying *mandamus* affirmed, with costs.

COLLIS P. HUNTINGTON, RESPONDENT, v. HENRY Y  
ATTRILL AND WILLIAM K. SOUTTER, APPELLANTS.

*False certificate as to the stock of a company being paid in full — 1875, chap. 611, sec. 21—over-valuation of property purchased by a company and paid for in stock.*

In the month of July, 1879, the defendant, Attrill, purchased from one Littlejohn a tract of land containing about 140 acres for \$80,000; he paid \$8,000 in cash and the balance was secured by a purchase-money mortgage upon the premises. In February, 1880, the Rockaway Beach Improvement Company was incorporated under the act of 1875, the capital stock being fixed at \$700,000, the defendants Attrill and Soutter being two of the commissioners named to receive subscriptions therefor. On April thirteenth the company resolved to purchase the property for the sum of \$700,000, in payment of which all the capital stock of the company was issued to the defendant Attrill, no part thereof being paid in cash. Attrill conveyed the property to the company, subject to the purchase-money mortgage, by a deed dated April first, acknowledged April tenth and recorded April seventeenth. On June 30, 1880, the defendants and others, who were directors of the company, subscribed and swore to a certificate stating that the amount of capital stock paid in full was the sum of \$700,000, the full amount of the capital stock of the company.

In this action brought against the defendants by the plaintiff to recover the debt due to him from the company, upon the ground that the said certificate was false, a judgment was entered in his favor.

*Held*, that it should be affirmed, as the evidence given upon the trial justified the jury in finding that the defendants had willfully and intentionally fabricated a false certificate.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury at the Kings County Circuit, and from an order denying a motion for a new trial.

*Coles Morris, Delos McCurdy and Michael H. Cardozo, for the appellants.*

*B. F. Tracy, for the respondent.*

DYKMAN, J. :

The Rockaway Beach Improvement Company was constituted in pursuance of the provisions of an act of the legislature designed to provide for the organization of business corporations, and passed June 21, 1875. The certificate of incorporation required by the statute, to give life to the company, was filed in the office of the Secretary of State, on the 18th day of February, 1880, and on the 15th day of June, 1880, the plaintiff in this action loaned to the company the sum of \$100,000.

As an evidence of the debt and a promise for its payment, the plaintiff received a promissory note for the full amount, made by B. E. Smith, payable to the order of the Rockaway Beach Improvement Company (Limited), on demand, with interest at six per cent per annum, and indorsed as follows: "The Rockaway Beach Improvement Company (Limited), by B. E. Smith, General Manager, 139 Broadway."

The money was received by the corporation and expended for its benefit. As security for the payment of the loan, the plaintiff received \$200,000 of the bonds of the company, for which it would seem he realized the sum of \$932, and this action is brought for the recovery of the balance due on the loan, and it is based on the following facts:

In the month of July, 1879, the defendant, Attrill, purchased from Littlejohn a plot of land containing about 140 acres, for the consideration of \$80,000. He paid \$8,000 of that sum in cash, and executed a purchase-money mortgage upon the property, as security for the payment of the remainder. The amount of the capital stock of the company was \$700,000, and the defendant Attrill sold and conveyed the premises purchased by him of Littlejohn, minus twenty-one acres, subject to the mortgage of \$72,000 which the company assumed for the consideration of \$700,000, and received his pay in the stock of the corporation, all of which was issued to him. His deed of conveyance to the corporation bears date April 1, 1880; it was acknowledged on the tenth day of April,

SECOND DEPARTMENT, DECEMBER TERM, 1886.

and recorded on the seventeenth day of the same month. On the 13th day of April, 1880, it was resolved by the company to purchase the property for the sum of \$700,000, payable one-half in the stock of the company and the other half in cash, although Mr. Attrill testified that he knew nothing of that proposition to pay him one-half of the purchase-money in cash until after the delivery of his deed.

No question arises upon these unimportant details, and the counsel for the appellants says in his points that no part of the capital stock of the company was paid in cash, and that it was all issued to the defendant, Attrill, in payment for the land conveyed by him to the company. So that fact is to be taken as settled. On the 26th day of February, 1880, the defendants and others were elected directors of the company for the first year.

After the consummation of the sale to the corporation, and on the 30th day of June, 1880, the defendants and others subscribed and swore to a certificate of full paid stock, in which they stated that the amount of capital paid in full was the sum of \$700,000, the full amount of the capital stock of the company.

Although that certificate was not literally true, yet it would have been constructively true and permissible under the statute, if the property conveyed by the defendant Attrill to the company was received for the use and legitimate purposes of the corporation at its fair value. (Section 14 of the law.)

So, conversely, the certificate was false if the property, at the time of its conveyance to the company, was not fairly worth the sum of \$772,000, and that is the claim of the plaintiff; nay more, the charge against the defendants is, that they made an excessive valuation of the property intentionally and purposely, and so brought themselves under the condemnation and penalty prescribed by the twenty-first section of the law reading as follows: "If any certificate or report made, or public notice given by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof."

These defendants are brought precisely within that section, and if they willfully and intentionally fabricated a false certificate of

full paid stock, as the plaintiff insists they did, then this action against them may be maintained on that ground.

So the question upon which the liability of the defendant was suspended was the intentional falsity of the certificate, and that depended upon the question in its rear — whether the property was purposely taken in at an excessive valuation. Most of the evidence adduced on the trial was aimed at that question, and a review of the testimony discloses but little encouragement to the defendants.

It would seem to require a jury, possessed of almost infantile credulity, to find that these defendants and their associates, endowed with intelligence and under control of their faculties, and their experience, could honestly believe that the property conveyed was fairly worth the enormous sum of \$772,000.

The charge of the trial judge was favorable to the defendants; and imposed upon the plaintiff a burden which was heavy almost beyond the requirements of the law, but which he sustained so successfully as to obtain the verdict of the jury under the pressure of its heavy weight, and the verdict is well supported by the evidence.

The scheme conceived by these defendants and their associates, and partially carried into execution, is almost beyond the imagination of prudent men, and verges into folly, and if courts and juries fail to allow them credit for honest motives, the failure results from inherent difficulties which seem to be insurmountable.

The result may be unfortunate for these defendants, but their difficulties seem to be radical and beyond remedy. We cannot interfere with the judgment.

We have examined all the exceptions of the defendants disclosed by the record with a care commensurate with the importance of the case, and we discover no error.

The judgment should be affirmed, with costs.

BARNARD, P. J., concurred.

Judgment and order denying new trial affirmed, with costs.



THE PEOPLE OF THE STATE OF NEW YORK *EX REL.*  
WILLIAM B. ASHLEY, APPELLANT, *V.* THE COMMISSIONERS OF HIGHWAYS OF THE TOWN OF EAST FISHKILL, RESPONDENT.

*Laying out and opening of a highway—Commissioners of highways will not be compelled to do so, if the public will derive no benefit from it.*

The dwelling-house and out-buildings of the relator are located about 375 feet northerly of a public highway in the town of East Fishkill, access thereto being obtained by means of a private way across the land of another private owner, and the land of a railroad company. In 1886 proceedings were instituted by the relator to procure a public highway two rods wide from his residence to the old road, and all the steps and measures required by the law were taken for that purpose and the jury certified to the necessity of the improvement, and the certificate of the jury was delivered to the commissioners of highways of the town, who forthwith filed it with the town clerk.

The relator thereupon released all claim for damages to result from the improvement, and agreed to fence the road and indemnify the town against all damages and all expenses of litigation. The highway commissioners having refused to lay out the road, the relator applied for a peremptory writ of *mandamus* commanding them to do so.

*Held*, that the motion was properly denied, as it appeared that the road, if laid out and opened, would be beneficial to the relator only and not to the general public, while the burden of its construction and maintenance would be imposed upon the town.

APPEAL from an order made at the Dutchess County Special Term denying a motion made by the relator for a peremptory *mandamus* requiring the commissioners of highways of the town of East Fishkill to lay out a certain highway in said town, as determined by the certificate of eleven jurors filed in the office of the clerk of said town on February 6, 1886.

*Herrick & Losey*, for the appellant.

*O. D. M. Baker*, for the commissioners, respondents.

*W. C. Anthony*, for the New York and New England Railroad Company.

DYKMAN, J. :

The dwelling-house and out-buildings of the relator are located on the northerly side of a public highway in the town of East Fish-

kill, and about 375 feet therefrom. Access to his residence from that highway is now obtained by him by means of a private way across the land of another private owner and the land of the New England Railroad Company. His way is laid across the railroad at grade, and also across a natural stream of water, about fifteen feet in width. It is two rods wide, and gates are maintained upon it on each side of the track of the railroad.

In the month of January, 1886, proceedings were instituted by the relator to procure a public highway, two rods wide, from his residence to the old road, and all the steps and measures required by the law were taken for that purpose, and the jury certified to the necessity of the improvement and delivered the certificate of the jury to the commissioners of highways of the town, and they forthwith filed it with the town clerk. The relator thereupon released all claim for damages to result from the improvement, and agreed to fence the road and indemnify the town against all damages and all expenses of litigation. Still the highway commissioners refused to lay out the road, and the relator applied to the Special Term for a peremptory writ of *mandamus* which should command them to do so, and his motion was denied, and he appealed from the order of denial.

From the foregoing statement it is plainly seen that the commissioners of highways are subserving the interest of their town by refusing to follow the certificate of the jury and lay out the proposed highway. If laid out and opened it would be beneficial to the relator alone, and not to the general public, and the burden of its construction and maintenance would be imposed upon the town for the accommodation of one person. It is true the relator has executed a personal undertaking to defray the expenses of the improvement, but the validity of the instrument is quite doubtful, and in our view it should be allowed no influence. The highway, if constructed, would be substantially for a private purpose, to furnish the relator with an unobstructed way from his house to the road, and in our view the compulsory power of this court should not be exerted for the accomplishment of that object.

Our conclusion, therefore, is that the public interests and the purposes of justice will be best subserved by withholding the writ. This view renders further examination of the questions involved

unnecessary, and we think the order should be affirmed, with ten dollars costs and disbursements.

• PRATT, J., concurred in result; BARNARD, P. J., not sitting.

Order affirmed, with ten dollars costs, besides disbursements.

**JAMES E. MUNGER, RESPONDENT, v. GEORGE B. CURTIS  
AND EUPHEMIA, HIS WIFE, THE MECHANICS' SAVINGS  
BANK OF FISHKILL-ON-THE-HUDSON AND OTHERS,  
APPELLANTS.**

*Mechanics' lien — does not exist until notice is filed — it only affects such interest as the owner then has — 1885, chap. 842.*

On June 18, 1886, a building which the plaintiff had erected under a contract made with the defendant Curtis was accepted by the latter. On that day, at about two o'clock in the afternoon, the defendant Curtis and his wife executed a mortgage upon the premises for the sum of \$900 to a savings bank, and received from the bank that amount. The savings bank sent the mortgage by mail to the county clerk, at Poughkeepsie, who received it at seven o'clock P. M. on June nineteenth. On June twenty-first, at eight A. M., the plaintiff filed a mechanics' lien upon the same premises.

*Held*, that the lien of the mortgage was entitled to priority over that of the plaintiff.

That the fact that the bank knew that the plaintiff had not been paid did not affect its right to such priority, in the absence of proof that it colluded with Curtis to defeat the claim and lien of the plaintiff.

APPEAL from a judgment, entered in Dutchess county upon the trial of this action by the court without a jury.

The action was brought to foreclose a mechanics' lien upon land in Matteawan, in the county of Dutchess, N. Y.

The plaintiff and the defendant Curtis entered into a contract by which the plaintiff was to furnish materials and do the carpenter work in building a house on land described in the complaint for \$850.40, to be paid when the building was completed. The building was completed on the 18th of June, 1886, and accepted by the defendant Curtis.

On the 18th day of June, 1886, defendant Curtis and his wife executed a mortgage on the said premises to the defendant the .

Mechanics' Savings Bank, for \$900. The bond and mortgage were delivered to the bank by Curtis at two o'clock in the afternoon of the nineteenth day of June, and the amount of the mortgage was then paid by the bank to him. The defendant Curtis, after receiving the \$900 from the bank, absconded without paying the plaintiff. The savings bank sent the mortgage by mail to the county clerk's office at Poughkeepsie for record, where it was filed, for record, at seven o'clock, P. M., on the nineteenth day of June. On the 18th day of June, 1886, the defendant Curtis executed a mortgage to Tallardy and Aldridge for \$300 on the same premises, and which was filed in the Dutchess county clerk's office, for record, on the 21st day of June, 1886, at seven o'clock and thirty minutes A. M.

On the 21st day of June, 1886, the plaintiff filed a mechanics' lien in said clerk's office upon the same premises at eight o'clock A. M. of that day, to secure the payment of his claim of \$850.40, and brought this action to foreclose his lien, claiming his lien to be prior to both of said mortgages.

On the trial judgment was rendered to the effect that said mechanics' lien was the first lien on said premises; that the savings bank mortgage was the second lien; and the Tallardy and Aldridge mortgage was the third lien.

*H. H. Hustis*, for savings bank, appellants.

*Wm. R. Woodin*, for the respondent.

DYKMAN, J. :

This is an action to foreclose a mechanics' lien, under the provision of chapter 342 of the Laws of 1885. The first section of that law provides that any person who shall perform labor or furnish materials in the erection of a house may, upon filing the notice of lien prescribed in the fourth section, have a lien for the price and value of the same upon the house and premises, to the extent of the right, title and interest of the owner existing at that time.

Under that law, therefore, a person furnishing labor and materials for the erection of any structure specified therein becomes a creditor-at-large, with a claim which may ripen into a lien, but he acquires no lien upon the premises until he files the requisite notice pre-

scribed for that purpose. If previous to the time of filing such notice of lien the title to the premises has become vested in another, he can acquire no lien, and his rights in that respect are cut off and lost. So if the premises are incumbered by a mortgage to a *bona fide* creditor, his claim is subordinate to the lien created thereby. These principles have always been recognized, and they seem to control this case.

The mortgage to the Mechanics' Savings Bank was honest, and although all the parties assumed that the money procured thereon would be appropriated to the payment of the claim of the plaintiff, yet the bank in no way undertook to make such application, and the law imposed no obligation upon it to do so. Section 2 of the Laws of 1885 has no application to such a case as this, and affords the plaintiff no relief. The equities of the parties are equal, and the plaintiff can secure only the relief afforded him by the provisions of the law, and that furnishes him no rights prior or superior to the lien of the bank mortgage.

The judgment should be reversed and a new trial granted, without costs.

PRATT, J.:

It does not seem to me that section 2 of chapter 342 of the Laws of 1885 has any application to the facts disclosed in this case. No fraud on the part of the defendant, the Mechanics' Savings Bank, is shown. It is not necessary to construe that section, as no part of it was intended to cover a case like the one in hand. That section only applies to cases where the money is paid, or the incumbrance is put on by collusion with the owner for the purpose of defrauding the contractor or sub-contractor.

It is the settled law that a mechanics' lien only attaches to the extent of the interest of the owner at the time the notice of lien is filed.

The mortgage to the savings bank was executed on the 19th of June, 1886, and the notice of lien was not filed until June twenty-first thereafter, hence the lien only attached to the equity of redemption then held by Curtis. (*Payne v. Wilson*, 11 Hun, 305; S. C., 74 N. Y., 355.)

The latter case holds, that a person entitled to a mechanics' lien

acquires no specific lien until he files his notice; up to that time he is a general creditor, with no greater equities than other general creditors, and he is affected by all equities in favor of those dealing with his debtor.

A lien will not cut off or affect a prior unrecorded mortgage made in good faith, and hence the struggle here over the question of priority of recording the mortgage and filing the notice of lien was unnecessary. The mortgage was executed and delivered, and the money paid prior to filing the notice of lien, and the equity of the mortgagee attached prior to the lien without reference to the recording act.

In the absence of proof that the bank colluded with Curtis to defeat the claim and lien of the plaintiff, and that its mortgage consequently was fraudulent and void, the mortgage is entitled to priority.

The fact that the bank knew the plaintiff had not been paid was immaterial. Any person has a right, in good faith, to loan money and take security from a party who is indebted to others, and a general creditor has a right to obtain security for his debt in preference to other general creditors.

The good faith of the bank here, cannot be questioned. The money raised upon the mortgage was stated by Curtis to be applied to pay off his debt to the plaintiff. The bank has as good a right to trust Curtis as the plaintiff had; the fact that he turned out to be dishonest is not the fault of the bank. The plaintiff knew that Curtis was to get the money from the savings bank, and he must have known that he could only get it by giving a mortgage. It is clear to my mind that this case falls within the principle stated in the case of *Payne v. Wilson* (74 N. Y. 355).

The judgment should be reversed and new trial granted, without costs.

Present — DYKMAN and PRATT, J.; BARNARD, P. J., not sitting.

Judgment reversed and new trial granted, without costs.

AARON S. ROBBINS, RESPONDENT, v. JOEL J. AUSTIN,  
APPELLANT.

*Deed*—when one executed by an attorney, "Francis Meriam, attorney, by Eliza Meriam," will be held to pass the title of Eliza Meriam, the principal.

A deed began: "This indenture, made the ninth day of June, one thousand eight hundred and seventy-four, between Eliza Meriam of \* \* \* by Francis Meriam, her attorney, under and by virtue of a certain power." The attestation clause was as follows: "In witness whereof the said party of the first part by her attorney has hereunto set her hand and seal the day and year first above written." It was signed "Francis Meriam, attorney, by Eliza Meriam."

*Held*, that as the instrument showed, by its terms, that it was the deed of Eliza Meriam who was the owner of the fee, it conveyed a good title.

*Wilks v. Back* (3 East., 143) followed; *Townsend v. Corning* (28 Wend., 435) and *Spencer v. Field* (10 id., 88) distinguished.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action at the Kings County Special Term by the court without a jury.

*George C. Case*, for the appellant.

*John Z. Lott*, for the respondent.

PRATT, J.:

This is an action for the specific performance of a contract for the exchange of land. The only question involved is the execution of the deed from Eliza Meriam to William A. Bradley, through which the plaintiff claims title. The deed begins: "This indenture, made the ninth day of June, one thousand eight hundred and seventy-four, between Eliza Meriam, of (etc.), by Francis Meriam, her attorney, under and by virtue of a certain power." The attestation clause is: "In witness whereof the said party of the first part, by her attorney, hath hereunto set her hand and seal the day and year first above written;" signed "Francis Meriam, attorney, by Eliza Meriam."

We think this deed conveys a good title. The instrument fairly shows by its terms that it was the deed of Eliza Meriam, owner of the fee. The grant purports to be the grant of the principal, and the attestation clause shows that the principal is attesting to it

her hand, her seal. This complies with the requirements of the law. In *Wilks v. Back* (2 East, 142) it was held that the signature, "for James Brown, Mathias Wilks," was a good execution by Brown, and that authority is not overruled by any authority in this State, but is recognized law. (See *Townsend v. Corning*, 23 Wend., 435.)

In *Wilks v. Back*, Justice GROUSE says: "I accede to the doctrine in all the cases cited, that an attorney must execute his power in the name of his principal, and not in his own name; but here it was so done, for where is the difference between signing T. B. by M. W., his attorney, which must be admitted to be good, and M. W. for T. B. In either case the act of sealing and delivery is done in the name of the principal, and by his authority, and whether the attorney put the name first or last cannot affect the validity of the act done."

The cases upon which the defendant relies, namely: *Townsend v. Corning* (23 Wend., 435) and *Spencer v. Field* (10 id., page 88), do not contravene this doctrine, as in that case the deed was signed merely by the attorney, Harvey Baldwin; neither the hand nor seal of the grantor purport to be affixed to the instrument, and for that defect it was held invalid. (*Jones v. Carter*, 4 Hen. & M., 196.) A deed executed by "Bushrod Washington, attorney for Carter," was held to be good.

The judgment should be affirmed, with costs.

Present — BARNARD, P. J., DYKMAN and PRATT, JJ.

Judgment affirmed, with costs.

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JOHN LIBBEY, APPELLANT, v. EMMA J. MASON,  
RESPONDENT.

*Letters of administration — when they may be granted without issuing a citation to non-residents — Code of Civil Procedure, sec. 2662.*

Lydia C. Libbey, a resident of the city of Brooklyn, died there intestate, leaving a daughter, Emma, who then resided in that city, and a husband, who resided in the State of Maine. The daughter presented a petition to the surrogate praying that letters of administration upon her mother's estate might be issued



to her. A few days thereafter the husband presented a similar petition asking that letters be issued to him. The surrogate granted letters to the daughter.

*Held*, that as it appeared that the husband was a non-resident the surrogate was authorized, by section 2602 of the Code of Civil Procedure, to grant the letters to the daughter on the presentation of her petition, without issuing any citation to the husband.

That he could exercise this power as well after as before the filing of the petition of the husband.

That the non-residence of the husband was decisively established by the fact that he voted regularly in the State of Maine, where he owned a small place and was accustomed to pass most of his time.

APPEAL from an order of the surrogate of Kings county refusing to grant letters of administration to the plaintiff, the husband of the intestate, and granting them to the defendant, her married daughter.

For a statement of the facts see the opinion of DYKMAN, J.

*Chauncey B. Ripley* and *A. B. Tappan*, for the appellant.

*Nathaniel B. Cooke*, for the respondent.

BARNARD, P. J. :

The conclusion of the surrogate, that the petitioner Libbey is a resident of the State of Maine, is well supported by the evidence. The proof shows that he owns a small place in Orono, Penobscot county, in that State. That he has been accustomed to pass most of the time there, and above all, that he has voted regularly in that State. This is a decisive proof of residence under the laws of Maine, as well as under our laws. The evidence also shows that the petitioner Mason resides in Brooklyn, N. Y. — a temporary change of domicile, for the purpose of educating her children. (*Dupuy v. Wurtz*, 53 N. Y., 556.)

The whole question, then, is whether the granting of the letter to Mrs. Emma Mason was proper.

The petitioner Libbey was the husband of Lydia C. Libbey, the deceased, intestate. The petitioner, Mrs. Mason, was the daughter (only daughter) of the intestate. The husband, by the Revised Statutes, had the better right. (3 R. S. [7th ed.], 2290, § 27.)

By the Code of Civil Procedure, however, it is provided that non-residents of equal or better right than a petitioner, to administration upon the estate of a deceased person, need not be cited, and that

when it is not necessary to cite a person, letters may be granted to a petitioner. (Sec. 2662.)

The petition of Mrs. Mason was presented to the surrogate, and no citation was issued to the husband. Letters to her were, therefore, properly granted under this section, if the husband was a resident of the State of Maine, about which fact there is no doubt. His petition, even if made before the actual granting of letters to Mrs. Mason, had no relevancy beyond the fact that he declared himself therein, to be a resident of Kings County, N. Y. If that was true, then a citation should have been issued to him; but it was not the fact, and the petition failed.

The surrogate's decree was, therefore, right, and should be affirmed, with costs.

PRATT, J., concurred

DYKMAN, J. :

Lydia C. Libbey resided in Brooklyn and died there intestate, leaving Emma J. Mason, her only child, who resided in Brooklyn at the time of her mother's death, and now resides in the city of New York, and John Libbey, her husband, who resides in the State of Maine.

Emma J. Mason presented a petition to the surrogate of Kings county praying for the issuance of letters of administration upon her mother's estate to her. A few days subsequently John Libbey, the husband, also presented a similar petition to the surrogate, who thereupon decided that letters should issue to the daughter. From that decree the husband has appealed.

Section 2662 of the Code of Civil Procedure is this: "Every person being a resident of the State who has a right to administration, prior or equal to that of the petitioner, and who has not renounced, must be cited upon a petition for letters of administration. The surrogate may, in his discretion, issue a citation to non-residents, or those who have renounced, or to any or all other persons interested in the estate whom he thinks proper to cite. Where it is not necessary to cite any person, a decree granting to the petitioner letters, may be made upon presentation of the petition."

Under the law it was not incumbent upon the surrogate to issue a citation to the husband, and it was entirely within his competence

and discretion to issue letters to the daughter immediately upon the presentation of her petition. The failure to issue letters to the daughter previous to the presentation of the petition of the husband did not divest the surrogate of his discretion, and he could exercise the same thereafter as well as theretofore.

We do not find that the discretion of the surrogate was improperly exercised, and the decree should be affirmed, with costs to be paid by the appellant personally.

Order affirmed, with costs.

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GEORGE ALDRIDGE AND PATRICK W. CARLIN, APPELLANTS, v. JOHN F. CLAUSEN, RESPONDENT.

*Rules for navigation of vessels — when a vessel is to be considered as an "overtaking" and not a "crossing" vessel, within the meaning of Navigation Rules 17, 23, 28 and 24.*

This action was brought to recover damages sustained by the plaintiffs' sloop by a collision with the defendant's lighter in the East river. Both vessels were beating up the river with the wind dead ahead, and at the time of the collision both were on the starboard tack, the lighter being to the windward. The sloop entered the East river after the lighter, and sailed faster than the lighter and closer to the wind. The captain of the sloop finding that she could not cross ahead or at the stern of a tug and her tow, which were also going up the river, caused her helm to be put down and signaled to the lighter to go about, which it attempted to do, but did not succeed in accomplishing in time to avoid a collision with the sloop. There was nothing in the evidence fixing, with even approximate accuracy, the difference in the courses of the vessels.

*Held*, that even if it were assumed that there was a difference of three points between the courses of the vessels, the sloop was to be considered as an overtaking vessel, and not as a crossing vessel, within the meaning of these terms as used in the navigation rules, and was bound to keep out of the way of the lighter. (DYKMAN, J., dissenting.)

*The Clement* (1 Sprague, 257); *The Cayuga* (14 Wall., 270); *The Peckforton Castle* (3 Prob. Div., 222) distinguished.

APPEAL from a judgment dismissing the complaint, entered in Dutchess county upon the trial of this action by the court without a jury.

The suit is for damages caused by a collision in the East river, which occurred in October, 1883, between the plaintiffs' sloop

and the defendant's lighter. Both vessels were heading up the East river, with the wind nearly dead ahead, and with a flood tide. The sloop was the faster vessel. Both tacked on the Brooklyn shore, the lighter about abreast of Gold street and the sloop about abreast of Pearl street. The lighter could not lie so close to the wind as the sloop did, and, moreover, after the lighter was headed off from Brooklyn she starboarded her helm to get under the stern of a tug with four schooners in tow, two on each side, which was also going up the river. The sloop kept her course without change until she also approached the tug and tow, when, finding that she could not cross ahead of them by keeping on, and that she could not get under their sterns by keeping off, her helm was put down and she came up into the wind and lay in stays. The lighter, which was approaching the sloop's starboard side, was hailed to go about, and after a period she attempted to do so, but not in season to avoid the sloop.

The rules for avoiding collisions, passed by congress (U. S. Rev. Stat., § 4233), furnish the law by which these two vessels were to be guided in their navigation, and according to which the rights of the parties must be determined. The plaintiffs claimed that the rules applicable are the seventeenth, twenty-third and twenty-fourth, which are as follows:

Rule 17. When two sail vessels are crossing so as to involve risk of collision, then, if they have the wind on different sides, the vessel with the wind on the port side shall keep out of the way of the vessel with the wind on the starboard side, except in the case in which the vessel with the wind on the port side is close hauled and the other vessel free, in which case the latter vessel shall keep out of the way. But if they have the wind on the same side, or if one of them has the wind aft, the vessel which is to windward shall keep out of the way of the vessel which is to leeward.

Rule 23. Where, by Rules 17, 19, 20 and 22, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of Rule 24.

Rule 24. In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger.

The defendant claimed that the rule applicable is the twenty-second rule, which is as follows: "Every vessel overtaking any other vessel shall keep out of the way of the last mentioned vessel." The judge below sustained this contention, and held that the sloop was an overtaking vessel, and that she was bound to keep out of the way of the lighter, and that, having failed to do so, she contributed to the collision.

*H. H. Hustis and R. D. Benedict*, for the appellants.

*Edwin G. Davis*, for the respondent.

CULLEN, J.:

This appeal is from a judgment dismissing the complaint on a trial before a justice of this court, without a jury. It is doubtful whether the exceptions of the plaintiffs are sufficient to raise any question on this appeal, because the trial justice was not requested to find any facts on which a recovery by the plaintiffs could be predicated, and hence, of course, no exceptions were taken to any refusals by the court to find such facts. However, we are disposed to pass over this question and examine the case on the merits to see if there was an error committed by the trial court.

This action was brought to recover damages sustained by the plaintiffs' sloop by a collision with the defendant's lighter in the East river. Both vessels were beating up the river with the wind dead ahead, and at the time of the collision both were on the star-board tack, the lighter being to the windward. The sloop entered the East river after the lighter, and not only sailed faster than the lighter, but also closer to the wind. The main point involved in this controversy is whether, at the time of the collision, the sloop is to be considered with reference to the lighter as an overtaking vessel or a crossing vessel. If an overtaking vessel then, under the twenty-second navigation rule, it was the duty of the sloop to have kept out of the way of the lighter. If the vessels are to be considered as crossing, then, both having the wind on the same side, the windward vessel, that is, the lighter, was bound, under the seventeenth rule, to keep out of the way of the sloop.

The contention of the plaintiffs as to the fact, is that there were three or four points difference between the courses of the two ves-

sels, and as to the law, is that such a difference makes the sloop a crossing vessel, instead of an overtaking vessel. As to the question of fact, here also the plaintiffs' case is defective. There seems to be nothing in the evidence fixing, with even approximate accuracy, the difference in the courses of the vessels. The seventh finding of fact is that the lighter could not lie within several points as near the wind as the sloop, but there is no finding determining the absolute courses of the vessels. But, if it be assumed that there was a difference of three points between the courses of the vessels, still we are of opinion that the sloop was an overtaking vessel, and not a crossing vessel, within the navigation rules.

Three cases are cited by the plaintiff to sustain the claim that such a divergence of course constitutes a crossing vessel. The first is the case of the *Clement* (1 Sprague, 257). In that case there was a difference of only two points between the courses of the vessels, and the vessel to windward was held in fault in not keeping out of the way of the leeward vessel. But this decision, which arose before the navigation rules, was based solely on the ground that the windward vessel had the wind free, and not with reference to the fact that the vessels were to be considered as crossing.

The second is the case of the *Cayuga* (14 Wallace, 270). In this case the difference between the courses of the vessels was over three points, and the case was held to be one of crossing vessels. The court held that the rule as to overtaking vessels did not apply; because, at the time precautions first became necessary, the distance between the vessels on a line at right angles to their courses was very great and the steamers nearly abreast.

The third is the case of the *Peckforton Castle* (2 Prob. Div., 222). Here, also, the question arose whether it was to be considered a case of a crossing or overtaking vessel. The Admiralty court found the divergence or difference of the courses to be four points, but based its decision on the ground that the windward vessel had the wind free, and should therefore have avoided the collision. On appeal (3 Prob. Div., 11), the court held that the difference of course was at least five points, and that the *Peckforton Castle* had never been seen from the colliding ship in any direction abaft her beam, and that, hence, it was strictly a case of crossing vessels, in which it was the duty of the windward vessel to avoid the other.

It will thus be seen that the cases cited (the last two of which only are in point), do not attempt to define what is a crossing vessel with regard solely to the difference of their courses. Nor can I find any case in which the difference of the courses is made the sole controlling element. In the case of the *Franconia* (2 Prob. Div., 12) the question, also, arose whether the case was to be considered one of crossing ships or of an overtaking ship. The court there say: "The rule as to crossing ships uses that term as a term of navigation, not as a mathematical term; and so, when the rule speaks of one ship overtaking another, it is a sea and not a mathematical term." It then proceeds to hold that a vessel will be considered an overtaking vessel, if the hinder vessel is so far astern that it cannot see the side lights of the forward ship, even though their courses be not parallel. But, in all these cases the vessels were in comparatively broad waters, and not going in the same general direction. In the case of the *Cayuga*, the steamers were crossing the river from opposite sides. In the case of the *Peckforton Castle*, the vessels were at sea at the end of the English channel, one bound up the channel and the other down. The rules held applicable in those cases cannot fairly apply to the navigation of a narrow river or arm of the sea. In such a case, it seems to us, that in determining whether a vessel is overtaking or crossing, regard must be had to the general direction of the vessels, whether up or down the river, and not altogether to the courses on which they may be running at a particular moment. The narrow and tortuous channels of rivers in this country oftentimes compel a vessel to change its course frequently and in the shortest distances. If such change of course is to determine the application of the rules of navigation, it would follow that the rules controlling the movements of vessels would be continuously changing as the vessel navigates the river, which would produce great confusion. This, we think, should not be the construction of the rule; but, if the vessels are going up the river, the one down the river should be considered an overtaking vessel, regardless of their courses. The plaintiff himself seems to have regarded the lighter as ahead of him, for he says in his testimony, "when we came around the Battery, we saw the lighter Billow ahead. \* \* \* We stood close to the Brooklyn shore, and the lighter Billow was ahead of us a little way." The *Velocity* (L. R., 3 P. C., 44), and

the *Ranger* (L. R., 4 P. C., 519), are both authorities to the effect that, in a winding and crowded river like the Thames, a particular direction taken for a few moments, to round a corner or avoid an obstacle, is not such an indication of the real course of a ship as to make her case, with reference to another ship, that of a crossing vessel.

We are, therefore, of the opinion that as both vessels were beating up the river and on the same tack, the sloop is to be considered an overtaking vessel, within the rules of navigation, regardless of the difference of their courses, and that, hence, it was her duty to have avoided the lighter; and that the collision was due to her (the sloop's) fault.

Judgment should be affirmed, with costs.

PRATT, J., concurred.

DYKMAN, J. (dissenting):

This is a common law action for the recovery of the damage resulting from an injury to the vessel of the plaintiffs.

They were the owners of the sloop *Commodore Jones*, and the defendant was the owner of the lighter *Billow*. On the 22d day of October, 1884, about ten o'clock in the forenoon, these vessels were beating up the East river, with a strong flood tide, and a strong wind dead ahead. The sloop was loaded with brick and carrying full sail. The lighter was sailing with jib and mainsail with the peak clewed. She was slower than the sloop, and could not lay so near the wind as that vessel, within several points; and with her sails in that condition she would not readily luff, nor quickly go in stays.

Before the accident both vessels were sailing upon the starboard tack, the lighter having stood off from the Brooklyn side near Gold street, and the sloop having made her tack one block below. In the course of both vessels there was a steam tug towing four schooners, two on each side, and bound up the river also. After the lighter had gone about and was full, she starboarded her helm so as to pay off and avoid the flotilla by going to its stern. The sloop forereached both the lighter and the tug, and had attained a point on the starboard quarter of the starboard schooner, and lapped up so far that she could not keep off and pass astern of the tug and



schooner, and could not weather them on that tack. Thereupon, to avoid a collision with the schooner, the sloop put her helm hard down and attempted to go in stays and come about on a short tack to the Brooklyn shore.

At that time her captain called on the lighter, which was then just to the windward, to go about. The jib of the lighter was lowered, and her helm was put down, but she was not quick enough in the wind to enable the sloop to go about, and so she remained in stays, running alongside the sloop until the bow of the lighter struck her slantly on her starboard side, forward of her rigging, and inflicted the damage complained of.

These substantial and prevalent facts stand uncontradicted, and the trial judge rendered a judgement for the defendant on the theory that the sloop was the overtaking vessel and, therefore, bound to avoid the lighter, and contributed to the disaster because she failed so to do.

By the congressional rules of navigation still applicable to the East river when sail vessels are crossing, so as to involve risk of collision if they have the wind on the same side, the vessel to the windward shall keep out of the way of the vessel to the leeward. (Rule 17.)

That rule applies to these vessels when they were on the starboard tack and had the wind on the same side. The lighter was to the windward, and could not sail so close to the wind as the sloop within several points, and after she was headed off from the Brooklyn shore and was full she starboarded her helm and fell off several points more to port to run under the stern of the tug and schooner, while the sloop kept her course; so there were several points difference between the courses of the two vessels. They were pursuing converging and intersecting courses, and a collision was certain if they both continued and reached the point of intersection at the same time.

In the situation it was the duty of the lighter as the windward vessel, in obedience to Rule 17, to keep out of the way of the sloop, and by Rule 23 of the Code of Navigation, where one of two vessels shall keep out of the way, the other shall keep her course subject to the qualification of Rule 24, which is this: In construing and obeying these rules due regard must be had to all dangers

of navigation and to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger. Rule 22 of the same Code is invoked by the defendant for his justification. It is this: "Every vessel overtaking any other vessel shall keep out of the way of the last-mentioned vessel."

But the sloop was not an overtaking vessel in any sense, except that of being the fore-reaching vessel. The lighter was to the windward, pursuing a crossing course, and both had the wind from the same way, and she falls easily within the operation and requirements of Rule 17. That she was a crossing vessel is also shown by the diagrams of the vessels shown in the case, and by the fact that she was obliged to port her helm to avoid striking the sloop head on. The sloop kept her course, in obedience to Rule 23, in the expectation that the lighter would obey Rule 17 and keep out of her way, and both these rules justify her movements. There was no occasion for the application of Rule 24, for there existed no special circumstances rendering a departure from Rules 17 and 23 necessary. The two latter rules contain ample provision for all the emergencies which arose in this case. The sloop obeyed Rule 23 and kept on her course, and if the lighter had been handled in obedience to the requirements of Rule 17 the encounter would have been avoided. There was no complication of circumstances, and neither vessel was disabled or beyond control.

If the lighter would not luff quickly, yet the fact that she answered her helm when it was ported, and came up to the sloop obliquely, shows that she could have kept out of the way had she gone about in time, and she had abundant room and time to do so.

The case of the *Clement* (1 *Sprague*, 257), and of the *Cayuga* (14 Wall., 270), are authorities in favor of the plaintiff, and the case of the *Peckforton Castle* (3 Asp. Mer. Cas., [N. S.], 511) seems to be similar to this. In that case there were four points between the courses of two sailing vessels, and they were held to be crossing, and the court said, "although the vessel which had the wind free was being overtaken by the faster ship, yet, as the faster ship was close hauled, and as both had the wind on the same side, the rule which governs this case is that which is contained in the twelfth article." That article was the same as our seventeenth rule.

We reach the conclusion, after a careful examination, that the lighter was in fault and the sloop was not, and that the plaintiffs are entitled to recover their damages.

The judgment should therefore be reversed, and a new trial granted, with costs to abide the event.

Judgment and order denying new trial affirmed, with costs.

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WILLIAM J. HILL AND MINNIE McDONALD, AS EXECUTORS,  
ETC., OF JOHN McDONALD, DECEASED, RESPONDENTS, v.  
CHARLES L. WOOLSEY AND OTHERS, APPELLANTS.

*Evidence — when the testimony of a party interested in the result is inadmissible —  
Code of Civil Procedure, sec. 829.*

This action was brought by the executors of one McDonald against the three sureties upon a lease, given by the deceased to Carpenter & Wise, to recover rent due thereon. It was defended by two of the sureties, upon the ground that the sureties had been induced to sign the lease by the false and fraudulent representations of the lessor. Upon the trial, evidence was given showing that when the lessees applied to the three sureties to become responsible for the payment of the rent, one of their number, Woolsey, requested that the lessees go to McDonald and ask for the amount taken in at the bar of the hotel in the previous year, when kept by McDonald. They went to McDonald and obtained the answer. On the trial the defendants offered, but were not allowed, to prove the communication of the same to the two defendants' sureties.

*Held*, that the evidence was properly excluded under section 829 of the Code of Civil Procedure.

That the lessees were interested in the result, as it appeared that they were in possession of the hotel, so that a judgment in favor of the sureties would leave them in possession thereof, and a judgment against the sureties would bind them.

That, being so interested in the result, they could not repeat the representations of the deceased, made to them when acting as the agents of the sureties.

APPEAL from a judgment, entered at the Kings County Circuit on a verdict directed by the court in favor of the plaintiffs, for \$1,314.09, balance due for the rent of a furnished hotel at Coney Island, leased by John McDonald, the plaintiff's testator, to the firm of Carpenter & Wise.

In consideration of the letting of the premises, the defendants agreed in writing with the lessors to pay any arrearages of rent. Two of the defendants answered, not denying the allegations in the complaint, but alleging, as a defense, that the tenants were induced to enter into the lease, and that they were induced to become sureties for the payment of the rent, by reason of the false and fraudulent representations made by the lessor.

*Wm. J. Gaynor*, for the appellants.

*Carpenter & Roderick*, for the respondents.

BARNARD, P. J. :

This action is one against the sureties of the lessees, upon a hotel lease, for the rent. The landlord who made the lease was one McDonald, who is represented by the plaintiffs.

Two of the sureties answer. Woolsey Sherman and the other surety, Schoonmaker, appeal from the judgment. The answer of the two sureties sets up fraudulent representations made by McDonald, by reason of which the sureties were induced to sign the lease as sureties. Upon the trial it appeared that Carpenter & Wise, the lessees, applied to the three sureties to become responsible for the payment of the rent. Woolsey, one of their number, requested that the lessees go to McDonald and ask for the amount taken in at the bar of the hotel in the previous years, when McDonald kept the hotel. They went and obtained the answers, and offered to prove the communication of the same to the two defending sureties. This evidence was objected to and excluded under section 829 of the Code of Civil Procedure. It appeared that the lessees were in possession of the hotel, and therefore were interested in the result, because a judgment in favor of the sureties would leave them in possession of the hotel, and a judgment against the sureties bound them. The witness Wise, one of the lessees, was incompetent to carry the message to the sureties. He could not testify to the representations made by McDonald to him. That was a clear personal transaction with a deceased party to the contract. As the agent of the sureties, being a party in interest, he could not repeat back the representations of the deceased. As an independent witness, he was excluded on his own account, as a

party interested in the result. It is true, that if McDonald was alive he could not deny what Wise told the sureties in his absence, but he could deny the conversation, and the validity of the testimony depended upon the declarations of McDonald.

The judgment should therefore be affirmed, with costs.

DYKMAN, J., concurred; PRATT, J., not sitting.

Judgment affirmed, with costs.

# MEMORANDUM

OF

A CASE NOT REPORTED IN FULL.

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AUBIN G. LOCKE, AS ADMINISTRATOR, ETC., OF JOHN D. LOCKE, DECEASED, APPELLANT, *v.* JAMES W. COVERT, AS RECEIVER OF THE JOHN D. LOCKE COMPANY (LIMITED), RESPONDENT.

THE PEOPLE OF THE STATE OF NEW YORK *v.* THE JOHN D. LOCKE COMPANY (LIMITED).

*Costs — when a receiver of a corporation will be directed to pay them.*

APPEAL from an order denying a motion to compel payment by the receiver of a domestic corporation of so much of a judgment against him as awarded costs and an allowance.

The moving party is an administrator who, after resistance by the receiver, finally obtained judgment against him, in an action brought against the corporation before his appointment. After the dissolution of the corporation the receiver served an answer denying nearly all the material allegations in the complaint and defended the action. Upon the trial, at which the receiver was represented by counsel and opposed the plaintiff's claim, the plaintiff's six causes of action were proved by entries in the books of the corporation then produced by the receiver in obedience to a subpoena. The complaint contained copies of these entries in these books. The receiver has on deposit in a trust company more than ten times the amount of the costs and allowance. All other claims against him which are entitled to a preference have been paid.

The court at General Term said: "The receiver is the custodian of a fund subject to the direction of the court to pay it out to parties establishing claims thereupon. The costs of the action were incurred for the benefit of the fund. It is, therefore, equitable that the expenses of the effort should be borne by the fund in whose

behalf they were incurred. In the language of Justice WOODRUFF, this is not giving a preference to a debt as such; it is requiring the fund to pay an expense incurred for its own benefit. The case of *Shields v. Sullivan* (3 Dem., 296) is in point and to the same effect. It follows that the motion to require the receiver to pay the costs should have been granted."

Order reversed, with ten dollars costs and disbursements.

*Roger Foster*, for the appellant.

*Denis O'Brien*, attorney general, for the people, and *Porter & Kelvert*, for the receiver, respondent.

Opinion by PRATT, J.

Present — BARNARD, P. J., DYKMAN and PRATT, JJ.

Order reversed, with costs and disbursements.

# Cases

DETERMINED IN THE

## FIRST DEPARTMENT,

AT

GENERAL TERM,

October, 1886.\*

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WILHELMINA HAACK, APPELLANT, *v.* JOHN H. WEICKEN,  
EXECUTOR, ETC., OF HEINRICH A. HAACK, DECEASED, AND  
OTHERS, RESPONDENTS.

*Election — a devisee, by electing to take under a will, waives a right to enforce a claim inconsistent with its other provisions.*

Upon the trial of this action, brought to reform a deed executed to the plaintiff's husband, Heinrich A. Haack, pursuant to an agreement for the partition of land devised by the plaintiff's father to his four children, it was shown that the intention was that the property described therein should be conveyed to the plaintiff and her husband, and that the latter should pay \$10,000 (one-half the value of the property) to another devisee. By the directions of the plaintiff's husband the deed was so made out as to convey the whole of the property to him, the name of the plaintiff being wholly omitted therefrom, which fact was not known to her or the party who executed the deed, he having neglected to read it, or to the other parties to the partition agreement, until after the death of the husband, which occurred several years after his receipt of the deed.

The husband left a will by which he gave and devised to the plaintiff a dwelling-house and property in Brooklyn, together with the sum of \$10,000, and declared these provisions to be in lieu of dower. After certain specific bequests, he gave all the rest, residue and remainder of his property, without other description, to his two sisters and a brother. The plaintiff, after learning that her name had been omitted in the deed and that the whole property had been conveyed to her husband, received under the provisions of this will a number of payments of portions of the legacy given to her, and also kept possession of the dwelling-house devised to her, and demanded that the executor should proceed

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\* Decisions handed down December 31, 1886.



and pay off a mortgage existing thereon as a debt of the estate, and delayed for a considerable period of time to commence proceedings to reform the deed. *Held*, that upon learning that her name had been omitted from the deed, the plaintiff was put to her election either to take under the will or to pursue her remedy by reformation of the deed, and that, in this case, she must be held to have elected to take under the will, and to have thereby lost the right to resort to the other remedy.

APPEAL from a judgment of the New York Special Term, dismissing the plaintiff's complaint, with costs.

*H. C. Place*, for the appellant.

*Rabe & Keller*, for the respondents.

DAVIS, P. J. :

This action was brought to reform a deed executed by one John A. Ropke to the defendant's testator, Heinrich A. Haack. The deed was executed to consummate an agreement of partition of certain lands devised by the plaintiff's father to his four children, of whom the plaintiff was one. One parcel of the land was situate in the city of New York, and that was considered to be equal in value to one-half of the property devised, and was estimated at \$20,000. It was arranged between the parties that this parcel should be conveyed to Heinrich A. Haack, then the husband of the plaintiff, and the plaintiff, and that Heinrich A. Haack should pay to another of the devisees the sum of \$10,000, half of its estimated value. It was satisfactorily shown to have been the intention of all the parties that the deed conveying this parcel of property should be made to the plaintiff and her husband, as joint grantees, so that the interest of the plaintiff in her father's estate should be represented in the grant, as well as the interest which her husband acquired by the purchase of the share of another of the devisees. It was shown, also, that by direction of the plaintiff's husband the deed was made out to him in such form as to convey the whole of the property to him, the name of the plaintiff, his wife, being wholly omitted from the deed. The fact of such omission was unknown to the plaintiff, and to the party who executed the deed as grantor, he having neglected to read it, but executed it assuming that it was in accordance with the mutual agreement.

Heinrich A. Haack, the grantee, died June 5, 1883, several years

after taking the above-mentioned conveyance. It was proven, also, upon the trial that the plaintiff did not know of the fact that the deed had not been taken in the joint names of herself and husband until after his decease, and that that fact also was not known to the other parties to the partition agreement.

Heinrich A. Haack left a will, by which he gave and devised to the plaintiff a dwelling-house and property situated in Brooklyn, and in which they resided, and also the sum of \$10,000, and these provisions were declared to be in lieu of dower. He gave certain specific bequests to other persons, and then gave and devised all the rest, residue and remainder of his property, without other description, to his sisters, Wilhelmina Hopke and Mary Oest, and his brother, Dederick Haack.

The plaintiff, after learning the fact that her name had been omitted in the deed, and that the whole property had been conveyed to her husband, received under the provisions of his will a number of payments of portions of the legacy given to her, and also kept possession of the dwelling-house devised to her, and demanded that the executor should proceed and pay off a mortgage existing thereon as a debt of the estate. She delayed to commence proceedings to reform the deed for a considerable period of time after her knowledge of the alleged mistake, and after the payments made to her under the will of her husband.

The court below found, as matter of fact, that there was no mistake in the omission of her name from the deed to her husband, and refused to find that there was any fraud on his part in having the deed prepared in that form, substantially, it is supposed, on the ground that no fraud was charged in the complaint. He found, also, in substance that the plaintiff, by her acts after she learned the fact subsequently to her husband's death, that the deed had been made to him alone, in receiving portions of the legacy and asserting other claims under the provisions of his will, had elected to take such provisions in lieu of any claim which she might otherwise have had to reform the deed.

We think the learned court ought to have found, on the evidence in this case, that the deed was made and executed under a mistake on the part of the grantor, who testified that he supposed it to be in accordance with the agreement that was made, and on the part

of the plaintiff, who supposed until after her husband's death, that her name as joint grantee was embodied in the deed ; and he might well have found that the decedent made a mistake in giving his directions to the scrivener who drew the deed, as otherwise his conduct would have been a palpable fraud. The findings of the court to the contrary would require a reversal of this judgment, and a new trial if the other ground upon which the court also directed the judgment were not fatal to the plaintiff's recovery.

It is a well settled principle of law and equity, where a testator devises and bequeathes portions of his property to a beneficiary under his will, and also by his will devises and bequeathes a residuary estate to other beneficiaries, which necessarily embraces property claimed by him, but in which the former beneficiary owns or claims to own an interest, that the acceptance by such beneficiary of the provisions of the will, with knowledge of the fact that the testator has thereby disposed of the property in which he claims an interest, will be held to be an election by him to take under the provisions of the will instead of asserting and pursuing a claim to the property devised or bequeathed to the residuary legatees. In this case, if the plaintiff takes under the provisions of the will, and succeeds in asserting her title also to the real estate deeded to her husband, she will substantially receive the entire amount of her husband's estate, and thus cut off the residuary legatees from that portion which it is manifest the testator intended to devise and bequeath to them. As joint grantee of the deed to herself and husband, she would take title to the whole of that property as survivor ; as devisee she would take the house and lots in Brooklyn ; and this comprises the whole of the real estate of which the testator died seized ; and her legacy of \$10,000, together with the payment of the debt of \$5,000 owing on the mortgage, would substantially absorb the entire estate.

This state of facts, we think, did put her to her election whether to take under the will or to pursue her remedy by reformation of the deed, and under the authorities cited by the learned counsel for the respondent, we think the case is one in which she must be held to have elected, and thereby to have created an equitable estoppel to the prosecution of this action. (*Thellusson v. Woodford*, 13 Vesey, 224 ; *Ker v. Wauchope*, 1 Bligh, 21, 22 ; *Tibbitts v. Tibbitts*, 19

Vesey, 663; and *Havens v. Sackett*, 15 N. Y., 365, 369.) In this last case, at page 369, DENIO, C. J., states the rule as follows: "One who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it. For example, if a testator has affected to dispose of property not his own, and has given a benefit to the person to whom that property belongs, the legatee or devisee accepting the benefit so given to him must make good the testator's attempted disposition."

Our conclusion is, therefore, that the judgment must be affirmed upon the ground last considered in this opinion, but, under the circumstances, without costs.

DANIELS, J., concurred.

BRADY, J.:

I concur, as the authorities seem to force the result declared, although I do not understand why the plaintiff's land should be lost by her acceptance of the provisions in lieu of dower, when there is nothing in the will which declares that it was thus intended by the testator to extinguish all other personal claims against the estate. She was entitled to dower by law.

Judgment affirmed, without costs.

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WILLIAM E. FAY, APPELLANT, v. ISAAC H. HEBBARD  
AND OTHERS, RESPONDENTS.

*Evidence—statements of third persons, when inadmissible as evidence against a party—right of an attorney to purchase a judgment in order to enforce the lien thereof on real estate—Code of Civil Procedure, sec. 78.*

This action was brought to have a judgment which had been assigned to the plaintiff declared a lien upon certain land conveyed to the defendant Hebbard by the judgment debtor, upon the ground that the conveyance was made to secure a debt, which the plaintiff asked to be allowed to pay off, in order that he might have the land sold under his judgment. One of the defenses to the action was that the judgment had been bought and paid for by one Thomas, the attorney for the plaintiff in the suit in which it was recovered, and that the title was taken in the name of the plaintiff, a clerk and stenographer in the

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FIRST DEPARTMENT, OCTOBER TERM, 1896.

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attorney's office, for the purpose of bringing a suit thereon for Thomas' benefit. Upon the trial, witnesses were called who testified as to statements made by Thomas to them, which tended to show that he, and not the plaintiff, was the purchaser of the judgment.

*Held*, that the evidence as to the purchase of the judgment by Thomas was not sufficient to justify the admission of his statement as evidence against the plaintiff.

*Seemle*, that even if Thomas had purchased the judgment for the mere purpose of establishing and enforcing a lien upon the property conveyed to the defendant, such purchase did not fall within the prohibition of section 78 of the Code of Civil Procedure, prohibiting such purchase by an attorney, with the intent and for the purpose of bringing an action thereon. (BRADY, J., concurred in the result.)

APPEAL from a judgment of the New York Special Term dismissing the plaintiff's complaint.

*Abner C. Thomas*, for the appellant.

*J. Tracy Langan*, for the respondents.

DAVIS, P. J. :

This action was brought by the plaintiff, as assignee of a judgment, to have the judgment declared a lien on certain land of defendant Hebbard, by establishing that the conveyance, to him of the land by the judgment debtor, was a mortgage only, to secure a debt of such judgment debtor, and thereupon to redeem by paying off the mortgage on the lands and selling the same under the judgment. It was alleged, as one of the defenses, that the judgment had been bought and paid for by Abner C. Thomas, the attorney of the plaintiff in the suit in which it had been recovered and title thereto taken in the plaintiff's name for the purpose of bringing suit thereon for the benefit of Thomas.

It was admitted in the case that the plaintiff, Mr. Fay, is a clerk and stenographer in the office and in the employ of Mr. Thomas. A witness was then called, who testified that Mr. Thomas told him that the check which paid for the assignment was made by him payable to the order of Mr. Fay and indorsed by Mr. Fay. This evidence was objected to as immaterial, and the objection was overruled and exception was taken. A motion to strike it out was also denied, and an exception was taken to the denial. The defendant in the judgment was called as a witness for defendants. He was asked if he

had had any conversation with Mr. Thomas about the purchase of the judgment, and to state what was said in such conversation. This was objected to by plaintiff, and the objection overruled and an exception taken. There was nothing in the case to show that Thomas' declarations were competent evidence against the plaintiff, for, outside of those declarations, nothing appeared that would justify their admission. An attorney is not competent to make admissions in conversation with third persons which will be evidence against his client as to the facts of his case. The plaintiff was not shown to be present at the conversation; and the mere incident that he was a clerk and stenographer, employed in his office, did not subject him to the effect of any casual declaration of Thomas as evidence against him. There was not enough shown to justify the admission of the statement of Thomas as evidence against plaintiff. The exceptions were therefore well taken.

Without the declarations of Thomas, there was nothing to warrant the court in finding that Thomas was the buyer of the judgment and the plaintiff his mere agent to enable him to purchase it in violation of the statute. For this error a new trial must be granted.

But we doubt very much whether the purchase of a judgment, to enforce an alleged lien upon property of a person not a party to the judgment, is within the prohibition of the statute. The judgment debtor is not sued upon the judgment. If it were bought by an attorney to sue over against the judgment debtor, as might have been done before the restrictions imposed by the Code or statute, the transaction might well be held within the inhibition. But the purchase of a judgment for the purpose of collecting it as such, by execution, or any other mode that simply enforces the judgment or its lien, is not within the letter of the statute or its mischief. Section 73 of the Code of Civil Procedure provides that "an attorney or counselor shall not directly or indirectly buy or be in any manner interested in buying a bond or promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon." There is nothing in this to prevent an attorney or counselor from buying anything named in the act for any other intent, use or purpose than that of bringing an action thereon. If an attorney or counselor buy a judgment with intent to sue the judgment debtor thereon, we think

it would be deemed "a thing in action" within the meaning of the provision. It would be within the spirit of the law and the mischief to be prevented; but it is quite another thing to buy a judgment with the intent to enforce it by execution against the judgment debtor, or by pursuing the lien it may have on his property in his own or another's hands. To enforce such a lien of a judgment is not to bring "*an action thereon*," within the meaning of the Code. (*Warner v. Paine*, 3 Barb. Ch., 620; *Brotherson v. Consalus*, 26 How., 213.) In this case the judgment debtor is not made a party to the action, and it was not necessary that he should be. He cannot be harassed in costs nor annoyed by another suit on the cause of action merged in the judgment.

In *Wetmore v. Hegeman*, the Court of Appeals say: "The aim of the statute was to prevent attorneys from purchasing claims for the express purpose of instituting suits thereon, and thus oppressing debtors and making costs." (*Wetmore v. Hegeman*, 88 N. Y., 73.) In this case the plaintiff seeks only to ascertain how much is due the defendant as a mortgagee of the judgment debtors real estate, on which the judgment is an alleged lien, for the purpose of paying the alleged mortgage and collecting the judgment out of the lands when redeemed from the mortgage. We think the court erred in holding that there was legal evidence that the plaintiff bought the judgment for the attorney, and also in holding that such a purchase, if made by an attorney for the mere purpose of establishing and enforcing a lien of the judgment, was within the statute.

The judgment must be reversed and a new trial ordered, costs to abide event.

BRADY, J., concurred in the result.

Judgment reversed, new trial ordered, costs to abide event.

ISAAC MOOG, APPELLANT, v. JAMES KEHOE AND CLAUS  
WILKENS, RESPONDENTS, IMPLEADED, ETC.

*Bond of a marshal of the city of New York — a party aggrieved cannot, under an order of a justice of the Court of Common Pleas, prosecute it in the Supreme Court—1862, chap. 484.*

An order permitting a person aggrieved by any official misconduct on the part of any marshal of the city of New York to prosecute the bond which the marshal is required, by chapter 484 of 1862, to give to the mayor, aldermen and commonalty of the city of New York, can only be made by a justice of the Court of Common Pleas, as is prescribed in section 7 of the said act, and his jurisdiction being a special and limited one, is restricted to the form of order prescribed by that act.

An order granting leave to prosecute the bond, in the name of the plaintiff, in the Supreme Court, instead of directing it to be prosecuted in one of the district courts of the city of New York, or in the Marine Court of that city, is not authorized by the act and cannot be sustained.

APPEAL from a judgment dismissing the complaint on the trial of this action at the New York Circuit, and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the trial was had.

*Anthony R. Dyett and I. L. Bamberger, for the appellant.*

*H. H. Glass and L. L. Kellogg, for the respondents.*

DAVIS, P. J. :

This action was brought on a city marshal's bond, executed under the provisions of chapter 484, of the Laws of 1862, to the mayor, aldermen and commonalty of the city of New York. Section 6 of that act provides that any person who shall be aggrieved by any official misconduct on the part of any marshal, and who may desire to prosecute his official bond, etc., may move, before a justice of the Court of Common Pleas in and for the city and county of New York at chambers, after notice, for leave to prosecute such official bond in his own name. And section 7 of the act provides that such justice of the Common Pleas may order such bond to be prosecuted in any of the district courts of the city of New York or in the Marine Court of the city of New York. A motion was made before a judge of the court of Common Pleas, under these provisions,



for leave to prosecute the bond in the name of the plaintiff, in the Supreme Court, and an order to that effect was granted by the judge. This action was thereupon commenced, and at the trial at Circuit, the court dismissed the complaint on the ground that the plaintiff could not maintain an action in this court in his own name, under the order granted by the judge of the Common Pleas. A motion was afterwards made before the justice holding the circuit for a new trial, which motion was denied; and this appeal is from the judgment dismissing the complaint and from the order denying the motion for a new trial. The act of 1862 provides a special form of procedure under which an aggrieved party may obtain an order from a judge of the Court of Common Pleas at chambers, authorizing the prosecution in his own name of a marshal's bond, and the act prescribes the order that such judge may make, by enacting that he may order such bond to be prosecuted in any of the district courts of the city of New York, or in the Marine Court of that city, and conferring jurisdiction upon either of those courts to entertain the action. No power is given to the judge of the Common Pleas to make any other order than that prescribed in those sections. His jurisdiction is a special and limited one, restricted to the form of order prescribed by the statute. He had no power to direct the prosecution of the bond in this court in the name of the plaintiff, and the order which purported to do so conferred no greater right upon the plaintiff than he previously possessed.

The right of the plaintiff to maintain an action in his own name on the bond in this court cannot be upheld by the order of the judge of the Common Pleas, and the learned justice was right in dismissing the complaint unless the plaintiff was entitled, independently of the order, to bring an action on the bond in his own name. The bond was given to the mayor, aldermen and commonalty of the city of New York. Undoubtedly this court has jurisdiction to entertain any action that the obligees may see fit to bring upon the bond, but no person other than such obligees can maintain an action thereon, in his own name, in this or any other court, unless specially authorized by some statutory provision.

The plaintiff is not an obligee of the bond, and for that reason cannot sue in his own name without showing some special statutory authority authorizing him so to do. He wholly fails to show that

because the order of the judge of the Common Pleas, which he produces, was not one which such judge had power to make. By consent of the obligees the plaintiff probably could have brought an action for his own benefit in their name; but no such consent appears to have been given. On the contrary, he undertakes to sue without the consent of the obligees, and in his own name, relying for his right to do so upon the order of the judge of the Common Pleas, which order such judge had not power to make. It is not a question of jurisdiction of the subject-matter in this court, but of the right to maintain an action upon a bond of a public officer given to the mayor, etc., by an alleged injured party without having taken the steps necessary to acquire that right, and upon the order, not of a court, but of a judge whose powers were restricted and limited by statute, and cannot be extended beyond such limitation.

We think, therefore, that the court below was right in dismissing the complaint and denying the motion for a new trial, and that the judgment and order should be affirmed.

BRADY and DANIELS, JJ., concurred.

Judgment and order affirmed.

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THE TONAWANDA VALLEY AND CUBA RAILROAD  
COMPANY AND B. W. SPENCER, RECEIVER, APPELLANTS,  
v. THE NEW YORK, LAKE ERIE AND WESTERN  
RAILROAD COMPANY, RESPONDENT.

THE BRADFORD, ELDRED AND CUBA RAILROAD  
COMPANY AND THOMAS C. PLATT, AS RECEIVER,  
APPELLANTS, v. SAME, RESPONDENTS.

*Contract between railroad companies, to endeavor to promote each other's interests — when not void as against public policy — a plea of ultra vires will not lie in favor of a party who has received benefits under the contract.*

The plaintiff and defendant, each being a railroad company, entered into an agreement by which the plaintiff agreed that it would at all times deliver to the defendant, for transportation, all the freight and passengers that it could lawfully control or influence, destined to points that could be reached by

way of the railroad of the defendant, or its connections, and that it would use its influence to promote the interests and the business of the defendant company, as far as it could, with proper regard for its own interests. The defendant company agreed that, so far as it could, with a proper regard for its own interests, it would use its influence and exercise its control to promote the interests and the business of the plaintiff company; it also agreed to make good any deficiencies in the net earnings of the plaintiff company to meet the interest upon its present bonded indebtedness, from time to time, as the same should become due and payable.

It was further agreed that, for the protection of the defendant company, in rendering assistance to the plaintiff company, the latter should cause to be deposited with the defendant company a majority of the capital stock of the plaintiff company in such manner as should be required, and that, so long as the management of the plaintiff company should be satisfactory to the defendant company, the latter would give, or cause to be given, to such representatives of the plaintiff company as should be designated by it, the right to vote upon the stock so deposited.

Upon the trial of this action, brought by the plaintiff to compel the defendant to pay certain sums which the defendant had become liable to pay under the terms of the contract, the complaint was dismissed upon the ground that the contract was contrary to public policy and void.

*Held*, that it was error so to do, as the arrangement was not *per se* void.

That if the question be considered as purely one of *ultra vires*, then it was obvious that the defendant was in no condition to avail itself of that objection, as it had entered upon, and enjoyed the benefit of, the contract for a long period of time, and could not now assert that the contract was void because it (the defendant) had no power to secure its performance in the manner stipulated in the instrument.

APPEAL from judgments of the New York Special Term, dismissing the complaints in each of the above entitled actions on the pleadings and opening of the plaintiffs.

In March, 1883, contracts were entered into between the plaintiff and the defendant in each of the above entitled actions, which are identically the same. By this contract the Tonawanda company agreed: "First. That it will, at all times, deliver to said Erie company, for transportation, all the freight and passengers, that it can lawfully control or influence destined to points that can be reached by way of the railroad of the Erie company or its connections, and will use its influence to promote the interests and the business of the Erie company, so far as it can, with proper regard for its own interests. Second. That for the protection of the Erie company in rendering assistance to the Tonawanda company under this contract,

it will cause to be deposited with the Erie company a majority of the capital stock of the Tonawanda company in such manner as shall be required, upon which, so long as the management of the Tonawanda company shall be satisfactory to it, the Erie company will give, or cause to be given, to such representative of the Tonawanda company as shall be designated by it, the right to vote upon the stock so deposited." The Erie company agreed: "First. That so far as it can, with a proper regard for its own interests, it will use its influence and exercise its control, to promote the interests and the business of the Tonawanda company. Second. That upon condition that the corporate control of the Tonawanda company shall become and remain vested in the Erie company, as above provided, the Erie company will make good any deficiencies in the net earnings of the Tonawanda company to meet the interest upon its present bonded indebtedness, from time to time, as the same becomes due and payable; and for any and all advances so made by it, with interest thereon, as well as for all advances made to said Tonawanda company by the Erie company for other purposes, with interest thereon, the Erie company shall have, and is hereby granted, a first lien upon the railroad franchises and property of the Tonawanda company, next after its bonded indebtedness aforesaid, and a first charge upon its surplus earnings, next after the payment of the accruing interest upon its said bonded indebtedness. This contract shall continue during the corporate existence of the companies parties hereto." It was alleged and conceded that the plaintiff companies strictly performed this agreement. The defendant company performed the agreement on its own part in the case of the Tonawanda company until the 1st day of September, 1884, advancing in the aggregate \$54,000, but, on the last mentioned date, an installment of interest upon the bond debt of that company having fallen due, and there being a deficiency of earnings to meet it, the defendant company, upon demand being made under the agreement, refused to make the necessary advances, and has continued to refuse to make the necessary advances for that purpose from that time down to the present. In the case of the Bradford company the defendant made good the deficiency from time to time until the 1st day of July, 1884, advancing for that purpose over \$37,000, but on the date last mentioned it refused to make good the deficiency then

existing, and has since continued to disregard its obligation. The refusal of the defendant company to perform its undertaking necessarily led to a default by the plaintiffs in the payment of interest upon their mortgaged indebtedness and to proceedings in each case for a foreclosure and the appointment of a receiver. These actions are brought to compel the defendant company to pay the sums of money which it has become liable to pay under the terms of the contracts. The motion to dismiss the complaint in each case was based upon the general ground that the contracts in question are contrary to public policy, and void.

*W. W. MacFarland*, for the appellants.

*J. Buchanan and C. Steele*, for the respondent.

DAVIS, P. J. :

These cases present identically the same questions, and they were, for that reason, argued together. The contracts upon which the actions were brought were alike in form and identical in their objects and purposes. They were mere traffic agreements, by which the parties arranged for an interchange of business for their mutual benefit and advantage, and stopping with the provisions which affect such interchange; there would seem to be no serious question of their legality.

The plaintiff company in each case contracted "That it will at all times deliver to the Erie company for transportation all the freight and passengers that it can lawfully control or influence, destined to points that can be reached by way of the railroad of the Erie company, or its connections, and will use its influence to promote the interests and the business of the Erie company, so far as it can, with proper regard for its own interests." And the Erie company contracted that, so far as it can, with a proper regard for its own interests, it will use its influence and exercise its control to promote the interests and the business of the plaintiff company. And in consideration of the performance of the agreement on the part of the plaintiff company, the Erie company agreed to make good any deficiencies in the net earnings of that company to meet the interest upon its present bonded indebtedness from time to time, as the same becomes due and payable.

We think there is nothing in these provisions obnoxious to any

law of this State. As collateral security for the performance of its agreement each of the plaintiff companies agrees to cause to be deposited with the Erie company a majority of the capital stock of the plaintiff company in such manner as shall be required, upon which, so long as the management of the plaintiff company shall be satisfactory to it, the Erie company will give, or cause to be given, to such representative of the plaintiff company as shall be designated by it, the right to vote upon the stock so deposited. And the promise of the Erie company to make good deficiencies in the net earnings of the plaintiff company is made upon condition that the corporate control of the plaintiff company shall become and remain vested in the Erie company as above provided.

The only question in the case is whether this provision in regard to the deposit of the stock as security for the performance by the plaintiff company of its contract, and the condition that the corporate control of the plaintiff company shall in that way become and remain vested in the Erie company, are invalid in law, and for that reason the whole contract between the parties is void. It is not contemplated that the plaintiff company shall not continue to carry on its business as a corporation by continuing to operate its railroad, as is its duty as a corporation. On the contrary, it is bound by the contract to do so in order to carry out the provisions to deliver to the Erie company all freight and passengers that it can lawfully control or influence, destined to the points mentioned. This is to be done under its own management and control so long as it performs the contract, but when it fails to perform its contract then the provision is that the Erie company may, by the exercise of the voting power of the stock deposited as collateral, place in control such a board of management as will perform the agreement. It cannot take the control itself, so that the Erie company will manage and conduct the business of the corporation, but it can appoint such officers and agents of the plaintiff company as will manage the business of that company as required by its contract. Beyond this, the contract confers no power or control upon the Erie company over the plaintiff company, and the power given is purely contingent and does not appear from anything in the case ever to have been exercised, nor does it appear that any necessity for its exercise has arisen:

It is averred by the plaintiff companies that the contract was performed on their part by the deposit of a majority of the stocks required, and that the performance of the contract by both parties was entered upon and continued until the defendant company saw fit to repudiate the same. The question arising upon these facts is an interesting one, by no means free from doubt, but we are inclined to the opinion, inasmuch as no decision is brought to our notice upon a precisely similar state of facts, that this arrangement is not *per se* void because in violation of law. If there be no question but that contracts between railway companies for the arrangement of their inter-mutual traffic may lawfully be made, by which one company may bind itself to pay stipulated sums or assume obligations to pay interest upon the bonds of the other, it is not clearly perceived why the company that undertakes so to pay may not secure the performance of the contract by arrangements which will enable it, in case of breach of the agreement, to appoint such officers or agents for the defaulting company as shall secure performance.

If the question be considered as purely one of *ultra vires*, then it is obvious that the defendant is in no condition to avail itself of that objection. It entered upon and enjoyed the benefit of the contract for a long period of time, and it is too late to assert that the contract was void because it had no power to secure its performance in the manner stipulated in the instrument. Neither company could assert such a defense after entering upon and enjoying the benefits of the contract. To avoid the agreement, the defendant must be able to assert that it was void in law as against public policy, or by reason of conflict with some provision of law, statutory or otherwise.

We are of opinion that the judgment should be reversed and new trial granted, costs to abide event.

BRADY and DANIELS, JJ., concurred.

Judgment reversed, new trial granted, costs to abide event.

CHRISTOPHER A. WYATT AND OTHERS, RESPONDENTS, v.  
JAMES B. BROOKS AND OTHERS, APPELLANTS.

*Place of trial of an action to set aside as fraudulent a general assignment covering real estate—the right to demand a change of venue cannot be defeated by an offer by the plaintiff to stipulate not to attempt to reach the real estate.*

A motion to change the place of trial of an action, brought to set aside an assignment for the benefit of creditors on the ground that it was made to hinder, delay and defraud the assignors' creditors, to the county in which certain real estate passing under the assignment is situated, cannot be defeated by an offer on the part of the plaintiff to stipulate that he will not attempt to reach the real estate of the assignors, assigned to the assignee, or make any claim of title or interest therein or thereto.

*Acker v. Leland* (96 N. Y., 384) followed.

APPEAL from an order of the New York Special Term, denying the defendants' motion to change the place of trial from New York to Onondaga county.

*Louis Marshall*, for the appellants.

*S. R. Stern*, for the respondents.

DAVIS, P. J. :

This is an action in the nature of a creditor's bill, to set aside an assignment made by the defendants Silberstein and Shovelsohn to the defendant Brooks, on the alleged grounds that the assignment was fraudulent and void on its face, and improper and illegal in form, and was made and executed with intent to hinder, delay and defraud, the creditors of the assignors. Amongst the property assigned was a parcel of land situated in the city of Syracuse, county of Onondaga, which belonged to the defendant Silberstein, and which, as appears by his affidavit, is of the value of about \$8,000, incumbered for about \$6,400, leaving a margin, as he states, of at least \$1,500 over and above the incumbrance. A demand of change of place of trial was made in due form, on the ground that the place of trial was not laid in the proper county, and the motion is based upon such demand and the grounds stated therein, and also upon affidavits tending to show that the place of trial should be changed for the convenience of witnesses.

To meet the claim that the city of New York is not the proper



place of trial, on the ground that the action affected the question of title or interest in real estate, the plaintiffs made a stipulation that they "will not attempt to reach the real estate of said assignors assigned to said assignee, or make any claim of title or interest therein or thereto." The Special Term denied the motion upon the affidavits and the stipulation referred to.

The construction given by the Court of Appeals in *Acker v. Leland* (96 N. Y., 384) to section 982 of the Code of Civil Procedure, requires us to hold that this action is local, within the provisions of that section. It must be tried in the county in which the subject of the action, or some part thereof, is situated. The defendants were therefore entitled, upon their demand, to have the place of trial changed, and the order should accordingly have been made unless the stipulation given by the plaintiffs had the effect to take the case out of the provisions of section 982 of the Code.

The object of the action is to have the assignment declared absolutely void, because made in fraud of creditors. The assignment conveys certain real estate to the assignee. A decision that it is void will affect the title to that real estate, and it is difficult to see how the stipulation that the plaintiff will not pursue the real estate or claim any interest therein, will prevent the effect of a judgment, if they succeed in obtaining one declaring the assignment void, from affecting the title to the land. A receiver appointed under such a judgment would take title to the land, and a refusal on the part of the plaintiffs to reap any benefit therefrom would only impose on the receiver the obligation of applying it to other creditors who might come in and be made parties to this action or commence other actions. The right of the defendants to change the place of trial cannot, we think, be disposed of by such a stipulation.

On the subject of witnesses, the question presented to the court was one addressed to its discretion, and it may be that the stipulation to admit on the trial what a portion of the defendants' witnesses would testify to, together with the witnesses sworn to on the part of the defendants to reside in the city of New York, were an answer to that branch of the motion. But we are not inclined to examine particularly the disposition made of this part of the motion, because the order changing the place of trial should have been granted on the ground already considered.

The order should, therefore, be reversed, and the motion granted, with costs of the motion and of this appeal to abide the event.

BRADY and DANIELS, JJ., concurred.

Order reversed, and motion granted, with costs of motion and of appeal to abide the event.

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BENJAMIN F. SMITH, APPELLANT, v. ALICE R. BAKER,  
RESPONDENT, IMPEADED WITH JAMES H. REDFIELD.

*Infant — when allowed to avoid a transfer of stock belonging to her, and bearing her signature — extra allowance — the court cannot presume bank stock to be worth more than its par value.*

This action was brought to recover the amount secured to be paid by a promissory note given by the defendant Redfield, and to have sixteen shares of bank stock, alleged to have been assigned as collateral security for the note, sold, and the proceeds applied to the payment of the note. The stock did not belong to Redfield, but belonged to the defendant Baker, for whom Redfield acted as guardian. While the defendant Baker was under the age of twenty-one years, and in or about the year 1872, she, at the request of Redfield, wrote her name upon the back of the certificate, without being told for what purpose he desired her signature and without any arrangement that the shares should be transferred to him, or that he should be at liberty to sell or dispose of them. Under her name, as she had written it, her own name was again written by Redfield as her attorney.

*Held*, that as there was no intention on her part to supply Redfield with the evidence of the ownership of these shares, she was not estopped from disputing the validity of the title acquired by the plaintiff.

That even if the shares had been received by the assignor of the plaintiff, or the plaintiff himself, in reliance upon the signature of the ward, she would not be legally bound, as she was an infant at the time, and the law would, in the absence of any actual representation concerning her signature or her age, permit her to avoid its effect on the ground of her infancy.

The shares were for the sum of twenty-five dollars each, and no evidence was given that they exceeded in value that amount. The judgment of the court below denied the right of the plaintiff to appropriate this stock to the payment of his debt, and granted an extra allowance of eighty dollars to the defendant Baker.

*Held*, that the court could not presume the shares to be worth more than their par value, and that the allowance should be reduced to twenty dollars.

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FIRST DEPARTMENT, OCTOBER TERM, 1886.

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APPEAL from a judgment recovered upon the trial of this action at the New York Special Term.

*Birdseye, Cloyd & Bayliss*, for the appellant.

*William F. McRae*, for the respondent.

DANIELS, J. :

The object of the action was the recovery of a debt against the defendant James H. Redfield, amounting to the sum of \$2,000 and interest, upon a promissory note made by him on the 24th of May, 1878, and the sale of sixteen shares of stock of the National Broadway Bank, and the appropriation of the proceeds towards the payment of the debt. The fact that the debt was contracted and the plaintiff was entitled to recover the amount of it, were proved beyond dispute upon the trial. But the shares of stock assigned as collateral security for the loan were not the property of Redfield, the debtor, but they belonged to the defendant Alice R. Baker, for whom Redfield acted as guardian during her minority. She was under his charge after the decease of her mother, and from the time she was about nine years of age until she attained the age of twenty-one years, in October, 1877. These shares of stock were part of her estate, and while she was under the age of twenty-one years, and in or about the year 1872, at his request, she appears to have written her name upon the back of the certificate. This was done under no arrangement that the shares should be transferred to him, or that he should be at liberty to sell or dispose of them, and she was not given to understand what his purpose was in desiring her signature, or that it was to be placed, or was, in fact, placed upon the certificate of these shares. There was, accordingly, no intention on her part to supply him with the evidence of ownership of these shares, without which, in no event, could he have used or disposed of the shares themselves. (*Weaver v. Barden*, 49 N. Y., 286; *McNeil v. Tenth National Bank*, 46 id., 325.) And it is quite evident that the assignor of the plaintiff received the shares upon no such understanding, for, under her own name, as she had written it, her name was again written by the defendant Redfield, as attorney, and, upon that signature the shares were probably transferred as security for this loan.

But even if the shares had been received by the assignor of the plaintiff, or the plaintiff himself, in reliance upon the signature of the ward, as she was an infant at the time, she would not legally be bound by this as her act. The law would still permit her, as long as she made no actual representation concerning her signature or her age, to avoid its effect on the ground of her infancy. This is a general legal principle, too well settled to require any support by the way of citing authorities, and, being an infant, she could not be estopped by the simple circumstance of her name being placed upon the certificate of these shares of stock. (*Ackley v. Dygert*, 33 Barb., 176; *Brown v. McCune*, 5 Sandf., 224.) These cases proceed upon the legal principle that a person under the age of twenty-one years will not be estopped from asserting the truth, by the mere circumstance appearing to have transpired in this case. And the latter authority has not otherwise been disapproved of, except so far as it has a tendency to exonerate an infant from liability to arrest on account of fraudulent representations actually made by such person. (*Schunemann v. Paradise*, 46 How., 426; *Eckstein v. Frank*, 1 Daly, 334; *Wallace v. Moss*, 5 Hill, 391.) The dealings through which the right is insisted upon, of appropriating these shares of stock to the payment of this indebtedness, took place exclusively between the plaintiff's assignor and the acting guardian of this infant, and in no manner precluded her from asserting her right to the shares, and repudiating the act and conduct of the person under whose charge she had been during the greater period of her minority. No act upon her part, either before or after she attained her majority, in any manner approved, confirmed or ratified, this illegal disposition of her property; but she, herself, continued to receive the dividends upon it near to the time when this suit was commenced. Upon the facts, as they were proven, the judgment denying the right of the plaintiff to appropriate this stock to the payment of this indebtedness was legal and proper. To that extent the case seems to be free from substantial ground for doubt. But, in determining the action without any proof as to the actual value of the shares, the court made an allowance in favor of this defendant amounting to the sum of eighty dollars. The shares themselves were for the sum of twenty-five dollars each, and as there was no evidence that they exceeded in value the amount for which they were issued, this allow-

FIRST DEPARTMENT, OCTOBER TERM 1886.

ance was unauthorized. It may, probably, in the absence of any proof, be presumed that the shares were of their face value, for they would ordinarily represent that amount of the capital stock of the bank issuing them, which, if it complied with the law, as it is to be presumed it had, would give them this extent of value. But the court could not presume them to be worth more than that sum. In making the allowance such a presumption seems to have been indulged in favor of this defendant, and upon the strength and effect of it, at least sixty dollars more was allowed to her by way of additional costs, than was permitted by subdivision 2 of section 3253 of the Code of Civil Procedure. This allowance should be reduced to the sum of twenty dollars, and with that modification the judgment should be affirmed, without costs to either party.

DAVIS, P. J., and BRADY, J., concurred.

Judgment modified as directed in opinion, and affirmed as modified, without costs.

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WILLIAM E. THORN, APPELLANT AND RESPONDENT, v.  
HARRIET H. GARNER AND FRANCES M. ISELIN,  
RESPONDENTS AND APPELLANTS.

*Interest — when allowed on a legacy to a son of the testator, from the time of the latter's death — an executor will be compelled to pay compound interest only in cases of gross delinquency.*

Thomas Garner, Sr., died October 16, 1867, leaving two sons, Thomas and William T., and three daughters. By his will he gave to his "son Thomas the sum of one million dollars, to be paid him within eighteen months" after the testator's decease. His son William T. qualified and acted as his sole executor. Thomas, the son, came of age on October 9, 1859, was married on June 6, 1867, and died on March 23, 1869, leaving a widow and a daughter, who are defendants in this action. He left a will, by which he appointed his brother William T. and the plaintiff his executors; both of whom qualified. In 1871 William T., and the plaintiff, as such executors, applied to the surrogate for a final settlement of their accounts, the defendants, the widow and daughter, having notice thereof, but not appearing, except that a special guardian was appointed for the daughter. On April fourth a decree was entered, settling the executor's accounts, in which the legacy of \$1,000,000 was credited as paid at the end of eighteen months from the death of the testator, without interest.

William T. Garner having died in 1876, the plaintiff brought this action for an accounting for his proceedings subsequent to the settlement in 1871, and to obtain leave to resign and have a successor appointed. A stipulation was made in this action allowing the question as to the right to receive interest upon the \$1,000,000 from the death of the testator to be considered, notwithstanding the accounting of 1871.

*Held*, that as the evidence showed Thomas Garner, Jr., to have been in feeble health, wholly dependent upon his father for the means of support of himself, wife and child, and that his father had, from the time Thomas became of age, until the time of the father's death, regularly furnished him the money necessary for his support, it must be presumed that the testator intended that Thomas' legacy should draw interest from the time of his death.

That the plaintiff should be charged with simple interest only on the additional amount found to be due from him at the time of the former accounting, and not with compound interest.

APPEALS by the plaintiff, and by the defendants above named, from parts of a judgment entered on the report of a referee.

*H. A. Nelson*, for the plaintiff, appellant and respondent.

*Joseph H. Choate, Duncan Smith and J. Evarts Tracy*, for the defendants, respondents and appellants.

CHURCHILL, J. :

Thomas Garner, Sr., died October 16, 1867, leaving a large real and personal estate, considerably exceeding \$5,000,000 in value. He left two sons, Thomas Garner, Jr., and William T. Garner, and three daughters. He left a will dated April 12, 1866, by which he made provision for each of his children. That for his son, Thomas Garner, Jr., was as follows :

"*Sixth*. I give and bequeath to my son Thomas, the sum of \$1,000,000, to be paid him within eighteen months after my decease."

He made his son, William T. Garner, his residuary legatee, thereby giving him a share of the estate considerably exceeding that of any other child. He appointed his two sons, one of his sons-in-law, and the plaintiff in this action, executors. William T. Garner alone qualified and acted as executor of his father's will. The personal estate proved sufficient to pay all the legacies of the will and debts of the testator, and to leave a considerable sum for the residuary legatee.

Thomas Garner, Jr., came of age October 9, 1859; he was married June 6, 1860; his only child, Frances M. Iselin, one of the defendants, was born July 3, 1861, and he died March 23, 1869, leaving a widow, the defendant, Harriet H. Garner, and their child above named. He left a will dated November 12, 1867, appointing as executors and trustees of his estate his brother, William T. Garner, with the plaintiff, both of whom, soon after his death, qualified and entered upon their duties as such.

In the early part of 1871, William T. Garner, with the plaintiff, applied to the Surrogate of New York for a final settlement of their accounts as such executors, of which the defendants, Harriet H. Garner and her daughter, then an infant, had notice. No appearance for the widow or her daughter appears to have been made, except that a special guardian was appointed for the infant. April 4, 1871, a decree was made by the Surrogate, adjudging the balance in the hands of the executors to be \$840,861.37, and directing them, after paying commissions and the expenses of the accounting, to hold and invest the same as directed by the will, which was done by them.

The account, as presented and allowed, credited the legacy of \$1,000,000 under the will of Thomas Garner, Sr., as having been paid April 15, 1869, or at the end of eighteen months from the death of the testator, and included no interest upon the legacy for any part of that period. It included an item of \$177,754.03, charged as cash paid by the executors to Garner & Co. for moneys advanced by Garner & Co. to Thomas Garner, Jr., during his life and before the legacy of \$1,000,000 was paid.

Garner & Co. was composed of William T. Garner and a nominal partner, who received a salary for his services and had no interest in the property or profits of the firm, and the moneys advanced by Garner & Co. to Thomas Garner, Jr., were in fact paid by William T. Garner, who, as executor of his father's will at the time when such moneys were paid to Thomas Garner, Jr., and also at the time when said legacy was credited as paid, had in his hands ample funds from which to pay the interest upon said legacy, if Thomas Garner, Jr., was entitled to interest thereon from his father's death.

William T. Garner died July 20, 1876, and the plaintiff has ever since been sole executor and trustee under the will of Thomas

Garner, Jr. This action is brought by the plaintiff to obtain permission to resign those positions, and for the appointment of a new executor and trustee, for an accounting subsequent to that before the surrogate in 1871, and for his discharge from further responsibility or accountability for the estate of Thomas Garner, Jr.

A previous action by the defendants, Harriet H. Garner and her daughter, against the plaintiff was brought soon after the death of William T. Garner, asking, with other relief, for the removal of the plaintiff as trustee and the appointment of a new trustee, for an accounting, and particularly that he be required to pay and make good the said sum of \$177,754.03, as having been improperly allowed upon the accounting before the surrogate.

That action was discontinued upon a stipulation providing that a proceeding should be commenced by the plaintiff to obtain the results sought in this action, and that upon the accounting to be had in that proceeding the decree made by the surrogate, above referred to, should be final, conclusive and binding upon the parties, except as to certain items, the adjustment of which was agreed upon in the stipulation, and also except as to "certain moneys, amounting in the aggregate to one hundred and seventy-seven thousand seven hundred and fifty-four dollars and three cents, which were paid by Garner & Co. on drafts of Thomas Garner, Jr., deceased, and for his account between the death of Thomas Garner, Sr., and the death of Thomas Garner, Jr., the question being not as to the fact that the money was paid to and for the account of Thomas Garner, Jr., but as to whether such payments are properly chargeable against the legacy left by the said Thomas Garner, Sr., to the said Thomas Garner, Jr." This action is not the proceeding contemplated when the stipulation was made, but is in the same direction, and the stipulation is conceded on both sides to be binding upon the parties to it in the accounting had in this action.

This action was referred, and the referee by his report has found that Thomas Garner, Jr., was entitled to interest upon his legacy from his father's death, and that the payments of cash in the item of \$177,754.03 should be treated as made by William T. Garner on account of that interest, to the extent of it, and the excess only treated as a payment on the principal of the legacy, and he has readjusted the account to conform to those findings. By such



readjustment he finds the sum of \$109,860.54 to have been on deposit with Garner & Co., in the hands or under the control of the executors of Thomas Garner, Jr., and uninvested on the 31st day of January, 1871, beyond the amount accounted for in the accounting before the surrogate, and he allows simple interest upon that amount from that date.

The plaintiff insists that interest was improperly allowed by the referee upon the legacy of \$1,000,000, from the death of Thomas Garner, Sr., and also that certain sums paid to William K. Thorne as attorney for the executors of Thomas Garner, Jr., were allowed only in part.

The defendants, Harriet H. Garner and Frances M. Iselin, insist that compound and not simple interest should have been allowed upon the sum of \$109,860.54, above mentioned.

These are the principal questions raised by the appeals, and the only ones necessary to be considered.

Ordinarily, a legacy is not payable until the time fixed by the will for its payment; or, if no time be fixed, until the period fixed by the statute has expired; and until payable it draws no interest.

To this general rule there are several exceptions, the most important of which is the case of a legacy left by a parent to a child, for whose maintenance no other provision is made, and who, unless interest be allowed, is without income intermediate the death of the testator and the legacy becoming due. In such case the legacy draws interest from the death of the testator. (*Green v. Belcher*, 1 Atk., 505; *Heath v. Perry*, 3 id., 101; *Hearle v. Greenbank*, 3 id., 695, 716; *King v. Talbot*, 40 N. Y., 76; *Brown v. Knapp*, 79 id., 136; *Redfield's Surrogate Courts*, 601.)

The rule is thus stated by Lord Hardwicke (1 Atk., 507, A. D. 1737): "It being a constant rule in equity, that whenever a legacy is given by a father to a child, as a provision for such a child, though the legacy be payable at a future day, yet the child has an immediate right to the interest of the money."

And again (3 Atk., 102): "How far a legatee, who is not entitled to the payment of his legacy immediately, shall have interest in the meantime, depends upon particular circumstances. \* \* \* But all these cases are subject to this exception if it is in the case of a child; for then, let a testator, give it how he will, either at twenty-

one or at marriage, or payable at twenty-one, or payable at marriage, and the child has no other provision, the court will give interest by way of maintenance, for they will not presume the father inofficious or so unnatural as to leave a child destitute." And this was a rule coming down from a much earlier period. (*In re George*, 22 (Moak's) Eng. Rep., 507, 510.)

This rule is recognized and made to include one not a child, but to whom the testator stood in *loco parentis*, in *Brown v. Knapp* (*supra*), where it is said (p. 142): "This rule is based upon the presumption that the testator, in such case, must have intended that the legatee should, in the meantime, be maintained at his expense, thus discharging his moral obligation, or carrying out his benevolent design. It is not needed for the application of this rule that the testator must have been under a legal obligation, *at the time of his death*, to support the legatee. Such obligation of a testator to support his own child continues only during his life. \* \* \* The duty of a testator, in this case, to provide for and support this infant grandchild, was almost, if not quite, as strong as that of supporting his own children, and it must be presumed that he meant to discharge that duty. \* \* \* This legacy, therefore, carried interest from the death of the testator."

It is said that the rule is limited to legacies to infants. Most of the cases in which the question has arisen have been those of legacies to infants, and the language used in stating the rule has frequently been limited accordingly. But the moral obligation of a parent to make provision for the support of a dependent child includes adult as well as infant children, and is certainly as great in the case of such adult child as in that of one not a child, but to whom the testator has assumed the place of a parent. This moral or natural obligation is frequently referred to as the foundation of this rule, and upon it rests the provisions of the Revised Statutes, which makes the parent liable for the support of an indigent child, whether adult or infant. (*In re Rouse's Estate*, 9 Hare, 649, 653; *Brinkerhoof v. Merselis*. 24 N. J. [Law], 680; 1 R. S., 614, § 1; 2 Kent's Com., 190.) A legacy given to an infant child by a will which makes other provision for its support, is held not to come within the rule, showing that the presumption of the intention of the testator upon which the rule rests, depends upon the fact that

the child is dependent and not otherwise provided for, and not upon the fact of infancy.

The case of *Bradner v. Faulkner* (12 N. Y., 472), is cited as settling this question favorably to the plaintiff. In that case, the testator gave to one of his two daughters (both adult and married) a farm valued at \$15,060 and a legacy of \$16,000; to the other, a farm valued at \$31,060. The will declared it to be the intent of the testator to give his daughters equal advantages in the disposition of his property. The surrogate allowed interest upon the legacy from the father's death. This was affirmed at General Term, but reversed by the Court of Appeals. The latter court said that the predominant intention of the testator was to give equality of benefit to his daughters, and, considering the various provisions of the will in the light of that intent, held interest upon the legacy to have been improperly allowed. That the interest was necessary to the maintenance of the legatee was not claimed. Indeed, the contrary appeared, since she had a husband, presumably able to maintain her; and, also, the will gave her a valuable farm, to the possession of which she would be entitled immediately upon her father's death. The question involved here is not hinted at in the opinion of the court.

In this case the evidence showed Thomas Garner, Jr., to have been in feeble health; that he was wholly dependent upon his father for the means of support of himself, wife and child; that he had no other source of income; and that from the time he became of age until his father's death, his father had regularly each year furnished him the money necessary for his support. The amount so furnished in 1864 was \$3,012.91; in 1865, \$8,088.35; in 1866, \$9,336.48; and in 1867 to October 16, the date of his father's death, \$10,526.48. From the regular increase of these annual amounts the father must have understood, at the time of making his will and at the time of his death, that his son was dependent upon him, and that that dependence was not diminishing. The legacy was a provision for his son's maintenance. Unless interest be allowed, the son was without income intermediate the death of the testator and the payment of the legacy. The case furnishes the strongest ground for presuming the testator to have intended that his son's legacy should draw interest from his death, and the judgment in that respect should be

affirmed. It is claimed for the plaintiff that the surrogate's decree on the accounting of the executors of Thomas Garner, Jr., made April 4, 1871, prevents the recovery by the defendants of interest on the legacy from the death of the testator. The stipulation made by the plaintiff with the defendants, in consideration of which they discontinued the action commenced by them in the Superior Court, furnishes an answer to this claim.

Had the question raised here been raised before the surrogate, and interest on the legacy of \$1,000,000 been allowed by him from the death of the testator, the payments of cash included in the item of \$177,754.03 would undoubtedly have been held first to apply in payment of that interest, and to that extent to have been extinguished, and the remainder only to apply in payment of the principal of the legacy, and the same result would have been arrived at as to the balance due at the time of that accounting as has been arrived at by the referee in this action. But the stipulation was obviously intended and understood by the parties as giving to the defendants the right to raise every question as to the allowance of that item or any part of it (except the fact of payment), which might have been raised on the hearing before the surrogate, and it was so treated on the trial of this case. Besides, the interest upon this legacy, if legally allowable, must, under the facts of this case, be regarded as assets in the hands or under the control of the executors of Thomas Garner, Jr., at the time of rendering their account in 1871, and not having been included in that account the decree is not conclusive against the claim now made by the defendants. (*Brown v. Brown*, 53 Barb., 217; *President, etc., Bank of Poughkeepsie v. Hasbrouck*, 6 N. Y., 216, 221; *Wurts v. Jenkins*, 11 Barb., 546.)

The plaintiff complains that part of the sums paid William K. Thorne for legal services, and charged to the estate of Thomas Garner, Jr., were disallowed by the referee. The charges were for services in keeping down taxation on the Garner estate. The whole amount of taxes on personal property paid for that estate, as well as these charges for legal services, were charged against the estate of Thomas Garner, Jr., and his sister Anna James Garner, who was also left a legacy of \$1,000,000 by her father's will. Upon the trial of this action it was stipulated by the parties that but one-

fourth of the taxes so paid should be allowed against the estate of Thomas Garner, Jr., and the referee has adopted the same rule as to the sums paid for the legal services of William K. Thorne. This, upon the evidence, is quite as favorable to the plaintiff as he had a right to expect.

As to the claim of the defendants, Harriet H. Garner and Frances M. Iselin, that the plaintiff should have been charged with compound interest upon the sum of \$109,860.54, with which the executors of Thomas Garner, Jr., were held to be chargeable, and which had remained uninvested from January, 1871, the referee was justified in rejecting it. Compound interest is allowed in cases of gross delinquency, or as a penalty for negligence or wrong-doing, or for some clear violation of a trust. For mere neglect to invest, simple interest is generally imposed. (*Clarkson v. DePeyster*, Hopk., 424, 427; *Hannahs v. Hannahs*, 68 N. Y., 610; *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Barney v. Saunders*, 16 How. [U. S. Rep.], 535, 542.)

In this case there is no evidence to show that the executors of Thomas Garner, Jr., supposed themselves chargeable with interest on this legacy until the question was raised in this action, or that they did not believe, in good faith, that they had invested for the benefit of their *cestuis que trust*, as directed by the surrogate, the whole trust fund, with the care of which they were charged. There is no uniform rule of redress in cases of this kind, but each calls for the exercise of the judicial discretion of the court, and in this case that judicial discretion was properly exercised.

The judgment should be, in all respects, affirmed, without costs of the appeal to either party.

DANIELS and BARRETT, JJ., concurred.

Judgment affirmed, without costs.

IN THE MATTER OF THE PROBATE OF THE LAST WILL, ETC., OF  
WINIFRED AUSTIN, DECEASED.

*Evidence—admissibility of the testimony of counsel as to communications had with a deceased person whose will he drew — Code of Civil Procedure, secs. 835, 836.*

Upon a hearing in a Surrogate's Court of an application for the probate of a will, which was resisted on the ground of undue influence, the counsel of the testatrix, by whom the will and codicils were prepared under her direction, and who superintended, as such counsel, their execution and publication, was called as a witness to show what transpired between the testatrix and himself, when he was called upon to prepare the will and codicils, in the process of their preparation and publication.

*Held*, that an objection to his testimony, as inadmissible under sections 835 and 836 of the Code of Civil Procedure, was properly overruled as without merit. That if this were not so it should not defeat the probate of the will in this case, because, even if the testimony of the counsel, so far as objected to, were eliminated from the case, there would still be evidence remaining which would not justify a finding that the will and codicils were made by the decedent under what the law recognizes to be undue influence.

APPEAL from the decree of the Surrogate's Court, admitting to probate the will and three codicils thereto of Winifred Austin.

*W. S. Logan and George Bliss*, for the appellants.

*Henry S. Sprague and Theodore W. Dwight*, for the respondent.

*James J. Thompson*, guardian *ad litem*, for defendants.

DAVIS, P. J. :

The decree of the surrogate admits to probate the will of the decedent and three codicils thereto. Mrs. Austin, the testatrix, was the widow of William Austin, and by the will of her husband she was the devisee and legatee in trust of all his property, real and personal, for her own use during her life, with power by her last will and testament to appoint and divide the same amongst their four sons and Jane Oakes, their daughter, and the children of a deceased son, in such shares and proportions as she might direct. The wills and codicils in controversy dispose of the *corpus* of the trust amongst the children and grandchildren, and also the property of the testatrix derived and saved from the income of the trust in

her favor, etc. The due and proper publication of the will and codicils by Mrs. Austin was fully established, and no evidence was given on the part of the contestants controverting her testamentary capacity. It was, however, asserted, and is still insisted on their part, that her will and codicil were induced by and resulted from undue influence exerted and used over her by her daughter, Mrs. Oakes, and the children of Mrs. Oakes, who are the chief objects of her bounty under such will and codicils. Upon this question the contestants held the affirmative. It was for them to show, by satisfactory evidence, that the will and codicils were so far the result of undue influence that, in judgment of law, they are to be regarded not as the will and codicils of Mrs. Austin, but of the persons who had wrongfully subdued and controlled her mind and its volition to their own purposes and objects. It does appear, on the face of those instruments, that Mrs. Oakes and her family receive a large and apparently excessive share of the property of which they make disposition; but that is by no means enough to affect the validity of the gifts. The will stands for the reason; and courts cannot, out of their real or supposed superior testamentary capacity, undertake to rectify or disturb any apparent or fancied inequalities or injustice. The intention of the testatrix controls as expressed by the will until it can be shown that what is expressed was not her intention, but the unlawful design and intention of another. The learned surrogate has examined this question in an opinion of great clearness and force, and has reached the conclusion that the contestants have not within the established rule governing such cases, shown that the will and codicil, or either of them, are the result of the alleged undue influence. He had the opportunity to see the witnesses and their demeanor on the stand, and hear their testimony and observe their manner in giving it, as well as the degree of intelligence and the *animus* with which it was given. With those advantages he reached the same conclusion to which the printed record of their testimony as sent up to us leads our minds; and under such circumstances our duty is properly performed by affirming his conclusions upon the opinion pronounced by him, and for the reasons he assigns.

There is but a single question of law presented by the return which, in our judgment, requires any comment.

It is enacted by section 835 of the Code of Civil Procedure that "an attorney or counselor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment;" and section 836 declares that "the last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or the client."

There is no doubt, says the learned judge who delivered the opinion in *Westover v. The Aetna Insurance Company* (99 N. Y., 56), that "whenever the evidence comes within the purview of the statutes it is absolutely prohibited and may be objected to by any one, unless it be waived by the person for whose benefit and protection the statutes were enacted."

Mr. Underhill, the counsel of Mrs. Austin, by whom the will and codicils were prepared under her direction, and who superintended, as such counsel, their execution and publication, was called as a witness to show what transpired between the testatrix and himself when he was called upon to prepare the will and codicils, and in the process of their preparation and publication. His testimony was objected to as prohibited by the section of the Code above quoted. The objection was overruled and the testimony was taken by the surrogate. It is contended by the appellants that the evidence of the attorney and counsel, so far as it was objected to, was "within the purview of the statutes as construed by the court of last resort."

The object of the new section was chiefly to declare the effect of a waiver of the statutory rule and by whom such waiver might be made. Section 835 of the Code was not intended to do more than classify, by codification, the well-known rule of the common law. (See 1 Throop Code, notes to sec. 835; *Hebbard v. Haughian*, 70 N. Y., 54; *Armstrong v. The People*, 70 id., 38.)

Communications by a testator to an attorney, or solicitor, or employee, to prepare a will, with reference to the will and its trusts, are not privileged. This has been settled in many cases. (*Russell v. Jackson*, 15 Jur., 1117; *Nourse v. Fisk*, 1 Ves., 342; *Duke of Bedford v. The Marquess of Abercorn*, 1 Myl. and Cr., 312; *Blackburn v. Craufords*, 3 Wall. [U. S. Rep.], 199.)

It will be unfortunate for testators if the communications they



make to counsel, for the purpose of enabling the latter to draft their wills, are held to be so far within the provisions of the Code now under consideration, as to prevent their use on behalf of the executors to sustain their wills. The object of the privilege is to make sacred that class of communications made by clients to attorneys or counsel for the purpose of enabling them to give advice, with full and correct knowledge relating to the transactions upon which such advice is sought in suits and actions civil and criminal, a disclosure of which might be prejudicial to the client or his interests.

If the construction of the statute claimed by the contestants were allowed, it is not perceived how any will could be proved by the attorney who drew it and supervised its publication, for he could not open his mouth as a witness without disclosing something in the nature of a communication made to him by his client. The Code does not place such a weapon for the defeat of wills in the hands of any one seeking to overthrow a will propounded for probate which presumably it was the intention of the testator should be sustained by the testimony of his counsel and adviser who prepared it.

We think there is no merit in the objection; but if it were well taken, it should not defeat the probate of the will in this case, because the testimony of the counsel, so far as objected to, may be eliminated from the case, and still the evidence remaining would not justify a finding that the will and codicils were made by the decedent under what the law recognizes to be undue influence.

The decree should be affirmed, but, under all the circumstances, without costs of the appeal.

BRADY and DANIELS, JJ., concurred.

Order affirmed, without costs.

EDWARD C. PERKINS, AS GENERAL GUARDIAN OF THE ESTATE OF EMILY L. MIDDLETON, AN INFANT, PLAINTIFF, v. JOHN STIMMEL AND JAMES McCREARY, DEFENDANTS.

*Action against sureties upon a general guardian's bond — as to whether it should be brought in the name of the infant or of the guardian — when an action will lie against the sureties on the bond before an accounting has been had by the guardian.*

This action was brought by the plaintiff, as general guardian of the estate of an infant, against the sureties, upon a bond given by a former guardian of the same infant, upon his appointment by the Surrogate's Court. Upon the trial the defendants objected to the maintenance of the action by the plaintiff, upon the ground that it should have been brought in the name of the infant, by the plaintiff as her guardian.

*Held*, that in view of the conflict of authority, as to the right of the plaintiff to maintain the action as general guardian of the infant, the court would hold that the suit was properly brought, but would allow the plaintiff, if he so elected, to change the title so as to make the action one by the infant, by the plaintiff as his general guardian.

The guardian, who was the principal in the bond, died on October 23, 1884, intestate, the public administrator of the city of New York being appointed to administer upon his estate. He found no assets, except six dollars and forty cents and an old desk containing a quantity of stationery and papers, and none of the assets belonging to the infant. On January 3, 1884, the guardian had filed his sworn account with the surrogate, showing \$12,137.40 to be then in his hands; and it was proved that, in September, 1884, he converted twenty-five shares of the Mercantile Trust Company stock, valued in his inventory at \$3,500, by transferring it from himself, as guardian, to himself as an individual, and thereafter selling it.

*Held*, that an objection that the action would not lie against the defendants, as sureties, without an accounting before the surrogate was properly overruled. That, although an accounting is one of the conditions of the bond, for a breach of which the sureties are liable, yet it is not the only condition, the primary condition being that the guardian "will, in all things, faithfully discharge the trust reposed in him," the breach of which condition, in this case, justified the bringing of the action.

That, while the courts will require an accounting by the guardian, when that will be necessary or availing to establish the extent of the sureties' liabilities, and when it is practicable to have one, yet, where it is a proceeding of no use or advantage to the sureties, and can only result in subjecting them to the burden of a double litigation, it will not be required.

MOTION for a new trial on exceptions directed to be heard at the General Term in the first instance, after a verdict had been directed in favor of the plaintiff.

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FIRST DEPARTMENT, OCTOBER TERM, 1886.

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*H. H. Davis and E. P. Wilder*, for the defendants.

*John C. Gray*, for the plaintiff.

DAVIS, P. J.:

This case bristles with objections and exceptions but they are mostly of a technical and unimportant character and need only the most cursory notice. The action is upon a bond given by a guardian upon his appointment by the Surrogate's Court, and many of the exceptions relate to its form and to the manner in which it was drawn, and its penalty inserted and its date omitted, etc., on and before the filing of it in the Surrogate's Court. The omission of the date is of no importance. The time of delivery determines the date, and the delivery and filing of such a bond in the Surrogate's Court controls the question of date where it is not inserted, and also where it is, when the question of date becomes important. A clerk of the Surrogate's Court filled out the bond, and, in doing so, inserted the penalty at double the valuation of the infant's property as stated in the petition. It is insisted for this reason, that the surrogate did not "fix the amount of the bond," as required by the statute. This objection is a *non sequitur*. It does not follow because the scrivener filled in the penalty in the blank, that the surrogate did not fix it. The bond was afterwards duly filed, and upon it and the other proceedings in the case, the surrogate in due form ordered and issued the letters of guardianship, in which he recites that "such guardian has duly executed and delivered a bond pursuant to law for the faithful discharge of his duty, and we being satisfied of the sufficiency of such bond," etc., do constitute and appoint him such guardian. This sufficiently answers all objections to the bond, so far as they relate to its execution, filing and penalty. Nearly or quite all the other objections touching the bond itself, and the proceedings preliminary to the letters, may be answered in the same way.

There are two questions raised by the exceptions more serious in their nature. The first is whether the suit upon the bond should have been brought in the name of the infant by the plaintiff as her guardian instead of by the plaintiff as guardian of the estate of the infant. There is no doubt, under the authorities, that the action might properly have been brought in the name of the infant by her

guardian. (Code, §§ 449, 468, 469, 470; *Segelken v. Meyer*, 94 N. Y., 47; *Buerman v. N. Y. Produce Exchange*, Daily Reg., 1886, p. 785; *Bradley v. Amsdon*, 10 Paige, 235.)

Probably that would have been the better practice. But there are authorities which allow the suit in its present form on such a bond. (*Thomas v. Bennett*, 56 Barb., 197; *Hauenstein v. Kull*, 59 How. Pr., 24; *Coakley v. Mahar*, 36 Hun, 157.) The question has no substantial merit. The cause of action is precisely the same in either case, and the object and result are the same if a recovery be had. The guardian in fact recovers as such in either action, and takes the property as guardian, and is bound to account to the infant for the judgment and its proceeds. The question could have been raised at the beginning of the suit by demurrer as well as at the end of a trial. When raised at the trial it ought not to be fatal. Every element is present by which the formal change can be made by amendment if necessary, and the interests of justice demand it. Nobody has been misled to his prejudice, and no good reason exists why the amendment should not be ordered even now if the plaintiff elects to make it. In such a case as this, although the bond is in form to the infant, it becomes on default an asset of her estate, which her guardian is entitled to possess and control, sue for and recover, and is bound eventually to account for. On recovery as has already been said he takes the proceeds as his in his relation as guardian, and is entitled to keep and defend possession, and to invest and control and finally account for the same. There is no sound reason why he may not sue in his capacity of guardian the question being precisely the same and the result the same as when he sues in the infant's name by himself as guardian. In the conflict of authority, we shall hold the suit properly brought as it is, but with leave however if plaintiff elect to do so, to change the title by a transposition of names, which seems to be all that is necessary.

The other, and still more difficult question is, whether an action will lie on the bond against these defendants, who were sureties, without an accounting before the surrogate. The guardian, who was the principal in the bond, is dead. He died intestate, and the public administrator of the city of New York was appointed to administer upon his estate. He was able to find nothing but six dollars and forty-one cents and an old desk containing a quantity of

stationery and papers. He found none of the assets belonging to the infant. To have called the public administrator to an account would have been an idle expense, and there was no one else to account. The guardian died about the 23d of October, 1884, as the pleadings admit. He filed his sworn account with the surrogate January 3, 1884, showing \$12,137.40 then in his hands. It was proved that, in September, 1884, he converted twenty-five shares of the Mercantile Trust Company, valued in his inventory at \$3,500, by transferring them from himself, as guardian, to himself as an individual, and selling them afterwards. To require an accounting under such circumstances would be a futile and idle ceremony, a vain thing, and vain things are condemned by legal maxims. Yet, if the language of the bond demands it, the law must respect the demand. An accounting is one of the conditions of the bond, for a breach of which the sureties are liable; but it is not the only condition; the primary condition is that the guardian "*will in all things faithfully discharge the trust reposed in him.*" This condition was broken in this case, and so broken that the performance of the other conditions are rendered nugatory by the misconduct of the guardian. Where such a state of things clearly appears, to require the infant to demand and compel a legal accounting before the surrogate or some other court, which, it plainly appears, will result in no benefit to her or to the sureties, seems not merely unnecessary but unreasonable and unjust. The conditions of the bond are divisible, and unless all must be broken before the sureties can be sued, then it is enough that the primary one is broken in such form as to show that the others are of no value. In *Girvin v. Hickman* (21 Hun, 316), in a somewhat similar case, it was held that an accounting before suit brought on the bond was not necessary, and the court, after reviewing the cases, said: "It is obvious, from the cases, that an accounting by the guardian is not always a prerequisite to an action against the sureties upon the bond, and there are many special circumstances in which it may be dispensed with. \* \* \* But, if the case is such that the extent of the guardian's liability appears without an accounting, why should an accounting be required before suit against the sureties?"

And Chancellor WALWORTH, in *Cuddebach v. Kent* (5 Paige, 98),

said: "The prosecution of a suit against him alone, in the first instance, would, therefore, be worse than useless as respects the sureties, and would subject them to the expense of a double litigation."

The upshot of the authorities seems to be that the court will require an accounting by the guardian where that will be necessary or availing to establish the extent of the sureties liability, and is practicable to be had; but where it is a proceeding of no use or advantage to the sureties, and can only result in subjecting them to the burden of a double litigation, it will not be required. This is equivalent to holding that the conditions of the bond are independent and divisible, and may be so treated in the class of cases referred to.

We think, therefore, as there seems to be no substantial reason why the amount of the verdict is not correct, judgment should be ordered for the plaintiff on the verdict.

BRADY and DANIELS, JJ., concurred.

Judgment ordered for plaintiff on verdict.

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THOMAS J. MADGE, APPELLANT, v. JOSEPH A. MADGE,  
RESPONDENT.

42h 524  
37 Mis' 30

*Evidence — admissibility of the confession of a defendant in an action for adultery — a decree will be granted when all just reason to believe that collusion exists is removed.*

In actions for divorce on the ground of adultery, the confessions of the defendant are always admissible in evidence, but to avoid the danger of collusion, the court, before granting the decree, will require such corroboration of the confessions as to remove all just suspicion of collusion. When that is satisfactorily done the confessions become a sufficient basis for a judgment for divorce.

In this case, in which the Special Term denied a motion for a decree of divorce, on the ground that the confessions of the defendant were not sufficiently corroborated, the General Term, after considering the evidence, reversed the order of the Special Term, holding that there was undoubted proof that the confessions were made; that they were clear and distinct; that they were sincere and not collusive, and that they were corroborated by the correspondence by letter of the guilty parties.

APPEAL from an order of the Special Term denying a motion to confirm the report of a referee and for an order for judgment thereon, for the plaintiff, in an action for divorce.

*Olin, Rives & Montgomery*, for the appellants.

DAVIS, P. J.:

The summons and complaint in this case were duly served on the defendant, under an order of publication, in the Island of Cuba, where she has resided for several years. The complaint charges adultery committed by the defendant with one Dr. Francesco Magdalena, at Baracoa, in the Island of Cuba, while she was on a visit to that Island in June, 1881. The parties were then residents of this State residing in Brooklyn, where the plaintiff carried on business. They were married at Baracoa in June, 1879, where the defendant's parents then lived and still live.

After the return of the defendant from her visit to Baracoa, the plaintiff intercepted letters addressed to her from Baracoa, which aroused suspicions of his wife's unfaithfulness. Several letters of that character came into his possession before he charged her with her misconduct. She then confessed her guilt, and the plaintiff ceased to cohabit with her. She afterwards wrote to him a full confession of her guilt, stating the same in detail, and acknowledging his right to a divorce, but throwing herself upon his mercy. The plaintiff refused to condone or pardon her crime, and shortly afterwards she returned to her parents in Cuba, the plaintiff remaining and still residing in Brooklyn. When this action was commenced, the papers for service therein were delivered to one George W. Wayman, captain of the steamer Saxon, a vessel plying between New York and Cuba, who was personally well acquainted with the defendant. To him were also given the written confession of defendant, and the various letters that had passed between the defendant and Dr. Magdalena. Captain Wyman visited the defendant at the residence of her parents in Baracoa and served the papers in the action; and in a long interview with her, in the presence of her friends, exhibited to her the various letters and other matters as well as her written confession. She acknowledged to him their authenticity, and stated that her confession was true and further in substance, that she was willing to make every atonement to her

husband in her power, and to aid him in procuring a divorce to which he was entitled. She also made and gave to Captain Wyman an additional written confession acknowledging her guilt as stated in her former confession. There were several other circumstances proved tending to show the correspondence of the guilty parties and its criminal nature. The plaintiff was fully examined, and denied all collusion between himself and his wife, and gave proof of such other facts as may under the rules be proved by the testimony of a plaintiff in such an action. The Special Term denied the decree of divorce on the ground that the confessions of the defendant were not sufficiently corroborated. In this determination we think the learned justice erred. The confessions of the defendant in such an action are always admissible in evidence, but to avoid the danger of collusion the court before granting the decree, will require such corroboration of the confessions as to remove all just suspicion of collusion. When that is satisfactorily given, the confessions become a sufficient basis for a judgment of divorce. In this case the competency of the confessions is undoubted. The circumstances under which they were made tended strongly to remove all suspicion of collusion. The plaintiff had already separated himself from his wife on suspicion of her infidelity caused by the letters he had intercepted. Those letters aroused just suspicion. He had presented them to her and she acknowledged them as letters addressed to her by her paramour; and afterwards she voluntarily wrote and sent to him a confession in detail of her guilt. Her conduct was manifestly governed by a deep sense of contrition for her offense, and a hope that her husband might pardon and restore her to his confidence.

Long after her return to her parents in Cuba, on being served with the papers commencing the action, she repeated her confession and acknowledged the genuineness of the correspondence between herself and Dr. Magdalena. The correspondence itself was abundantly corroboratory of her confession. It is impossible to read it without being satisfied that the relations of the writers had been too intimate to admit belief of innocence. The genuineness of some of the letters was sufficiently proved also, by the fact that they were intercepted after their arrival and before delivery to her, and that they bore the foreign postage stamp marks indicating



whence they had been sent. These facts coupled with her admission that they were written by Dr. Magdalena were sufficient to admit them in evidence against her. Her own letters were not only acknowledged by her as genuine, but her handwriting was distinctly proved by a witness familiar with it. The letters being thus admissible, their contents became evidence highly corroboratory of the truth of her confessions.

The rule in such case is well stated by GIBSON, C. J., in *Matchin v. Matchin* (6 Penn., 332), in these words: "It is a rule of policy however not to found a sentence of divorce on confession alone. Yet, where it is full, confidential, reluctant, free from suspicion of collusion, and corroborated by circumstances, it is ranked with the safest proofs."

There are a number of cases in the books in which confessions have been taken as sufficient evidence, "where," as said by Bishop (vol. 2, § 248), "the circumstances are such as to repel all suspicion of collusion, and leave in the hands of the court no doubt of the truth of the confessions."

In *Billings v. Billings* (11 Pick., 461) there was no other evidence but a letter written by the husband who had been living for fourteen years in another State to his wife, which stated that he had lived with another woman, by whom he had children, but expressing penitence and a desire to be reconciled to his wife. The court held that the circumstances repelled collusion, and granted the decree on the confession of the letter alone.

In *Tucker v. Tucker* (11 Jurist [Eng.], 893), the confession of the wife was confirmed by letters received by her from her paramour, and by declarations made by her at a subsequent period. Dr. LUSHINGTON held the proof of guilt sufficient and granted the decree. *Williams v. Williams* (Law Rep. [1 P. and D.], 29), *Le Marchant v. Le Marchant* (45 Law Jour. [P. and D.], 43), are strong cases showing under what circumstances admissions or confessions in writing may be sufficient.

There is in the case before us undoubted proof that the confessions were made, that they were clear and distinct, and that they were sincere and not collusive, and they are corroborated by the correspondence by letters of the guilty parties. We think the court should have confirmed the report of the referee, and granted judgment for the plaintiff.

FIRST DEPARTMENT, OCTOBER TERM, 1886.

The order must, therefore, be reversed, and judgment of divorce awarded.

BRADY and DANIELS, JJ., concurred.

Order reversed, and judgment of divorce awarded.

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58	193
58	201
42	528
124a	451

GEORGE A. HAYNES and FRANK E. HAYNES, APPELLANTS, v. JOHN I. BROOKS, INDIVIDUALLY, and DAVID S. BROWN, AS ASSIGNEE, ETC., RESPONDENTS.

AMASA SPRING and CYRUS HAYNES, APPELLANTS, v. SAME, RESPONDENTS.

*General assignment — firm creditors may be preferred to individual creditors — the surviving partner may make a general assignment — debts contracted by a surviving partner are his individual debts.*

This action was brought by the plaintiff, as a judgment creditor of the defendant Brooks, to set aside, as fraudulent, a general assignment made on March 3, 1884, by the defendant Brooks as the surviving partner of a firm composed of himself and one Edward Brooks, who died in September, 1883. The assignment, which contained preferences, included so much of the partnership stock as still remained undisposed of and such further goods as the assignor himself had purchased and added to the stock, during this intervening period, which still remained unsold.

*Held*, that an objection to the validity of the assignment, on the ground that the assignor could not devote his own individual property to the payment of debts owing by the firm, of which he had been a member, could not be sustained *Kirby v. Schoonmaker* (3 Barb. Chy., 46); *Hurlbert v. Dean* (2 Abb. Ct. of App., 429) followed.

That the assignor, as surviving partner of the firm, had authority to make it and to include therein the property of the preceding firm.

*Emerson v. Senter* (118 U. S., 8); *Williams v. Whedon* (89 Hun, 98) followed.

After providing for the payment of the preferred debts, the assignor directed that the assignee should pay and discharge the other debts owing by the firm of John I. Brooks & Co., or against the assignor, as the survivor thereof.

*Held*, that an objection that the assignment did not provide for the payment of the individual debts of the assignor, was not well founded, as, whatever debts were contracted by him since the dissolution of the firm were his individual debts, and describing himself as the survivor of the firm did not change their character or affect his liability upon them.

*O'Neil v. Salmon* (25 How., 246); *Crook v. Bindakoff* (84 Hun, 457); and *Collob v. Caldwell* (16 N. Y., 484) distinguished.

FIRST DEPARTMENT, OCTOBER TERM, 1886.

APPEAL from a judgment in favor of the plaintiff, recovered on a trial of this action at a Special Term.

*George W. Van Slyck*, for the appellants.

*Franklin Paddock*, for the respondents.

DANIELS, J. :

The action is prosecuted by the plaintiffs, as judgment creditors, to set aside as fraudulent a general assignment by the defendant, John I. Brooks, for the benefit of creditors. He was the surviving partner of the firm composed of himself and Edward C. Brooks, deceased. His partner died in September, 1883, and he himself carried on the business until this assignment was made on the 3d of March, 1884. It included so much of the partnership stock as still remained undisposed of, and such further goods as the assignor himself had purchased and added to the stock during this intervening period, and still remained unsold. By the assignment, preferences were made which were directed to be paid out of the proceeds of the assigned property, and the plaintiffs have objected to the legality of the assignment on the ground that the assignor could not in this manner devote his own individual property to the payment of debts owing by the firm of which he had been a member. But this objection cannot be sustained for the reason that the law permits a partner to appropriate his own individual property, as well as that of the firm, to the payment of partnership debts. This was considered and held in *Kirby v. Schoonmaker* (2 Barb. Ch., 46), and that principle was followed in *Hurlbert v. Dean* (2 Abb. Ct. of App., 429). It was also considered the law in *Egberts v. Wood* (3 Paige, 517, 526), and *Shanks v. Klein* (104 U. S., 18), seems to have proceeded upon the same understanding.

A further objection taken to the assignment is that the assignor, as surviving partner, had no authority to make it and include in it the property of the preceding firm. But this has been held otherwise in the case of *Williams v. Whedon* (39 Hun, 98), and in the still more recent case of *Emerson v. Senter* (118 U. S., 3). And these decisions, to some extent, certainly reduce the force and effect of *Nelson v. Tenney* (36 Hun, 327), which, however, did not dispose of the point now being considered.

A further objection to the assignment is that it has not provided for or directed the payment by the assignee of the individual debts owing by the assignor. But that, as a matter of construction, seems to be a misapprehension, for the assignment by its fourth paragraph directs the assignee not only to pay the other debts owing by the firm of John I. Brooks & Co., but also the debts against the assignor as the survivor of that firm. And this direction does include his individual debts; for, whatever may have been contracted by him since the dissolution of the firm, were his individual debts as the surviving member, and describing himself as the survivor of the firm did not change their character or his liability upon them. Under this direction it would be the duty of the assignee to pay, not only the remaining debts of Brooks & Co., but also such debts as should be found to be owing from the assignor himself. The cases of *O'Neil v. Salmon* (25 How., 246) and *Crook v. Rindskopf* (34 Hun, 457), are entirely distinguishable from this point presented by this appeal. And so is that of *Collomb v. Caldwell* (16 N. Y., 484), inasmuch as the assignment does authorize and make it the duty of the assignee to pay all the debts of the assignor, whether owing by the firm or by him individually. And the obligation, after such payments, if the estate should prove sufficient for that purpose, is imposed by law of returning the surplus to the assignor. The case was disposed of at the trial, as the law required that to be done, and the judgment in this action, as well as in the other case heard with it, of *Spring v. Brooks*, should be affirmed.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

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FREDERICK N. HAMLIN, RESPONDENT, v. ELISHA R. WHEELOCK, APPELLANT.

*Contract — when invalid because not supported by any legal consideration.*

By an agreement entered into between the parties to this action the defendant agreed to pay to the plaintiff two dollars and fifty cents on each and every 5,000 bushels of grain purchased and sold, or sold and purchased, in the course

FIRST DEPARTMENT, OCTOBER TERM, 1886.

of the defendant's business, to any customer or customers who should be introduced to him by the plaintiff, *or by either of the persons so introduced.*

*Held*, that so far as the contract provided for the payment of the amount specified for the act of the plaintiff in introducing customers to the defendant, it was valid, as this was an act of service performed by the plaintiff, beneficial to the defendant, which the law will permit to operate as a legal consideration. That, in so far as it provided for the payment of the amount specified, in the case of persons introduced to the defendant by the dealers introduced to him by the plaintiff, it imposed no legal obligation upon the defendant, as there was no legal consideration for his promise to pay, since any benefit he derived therefrom was in no way dependent upon the act, authority, direction or concurrence by the plaintiff, nor did the latter subject himself to any inconvenience or injury.

APPEAL from an interlocutory judgment, entered upon the trial of this action before a referee.

*George W. Van Slyck*, for the appellant.

*John L. Branch*, for the respondent.

DANIELS, J. :

The interlocutory judgment directs an accounting of the purchases and sales of grain made by the defendant, to ascertain the amount payable to the plaintiff out of the proceeds of such sales, under an agreement alleged in the complaint, and found to have been proven by the referee. The evidence was in conflict as to the making and terms of the agreement, but it was sufficiently favorable to the plaintiff to support the referee in his conclusion that the agreement was made as the plaintiff's testimony tended to establish the fact to be. By this agreement, as it was found to have been proven, the defendant agreed to pay to the plaintiff two dollars and fifty cents on each and every 5,000 bushels of grain purchased and sold, or sold and purchased, in the course of the defendant's business, to any customer or customers who should be introduced to him by the plaintiff, or by either of the persons so introduced, and the accounting directed by the referee is as broad as this contract is found to have been made between the parties.

The referee has also found, upon proof, which was ample for that purpose, that the plaintiff did introduce to the defendant, two persons who dealt with him in the purchase and sale of grain, and upon whose transactions the plaintiff was entitled to these commissions ;

for the act of introducing these customers to the defendant was a legal consideration to that extent, for the agreement entered into by the plaintiff. It was an act of service performed by the plaintiff, beneficial to the defendant, which the law will permit to operate as a legal consideration. (*White v. Drew*, 56 How., 53.) And the referee was right in directing an accounting to take place to ascertain the extent of the dealings of these parties with the defendant, upon which the plaintiff was entitled to recover such commissions.

But, as to the persons introduced to the defendant by either of the dealers introduced to him by the plaintiff, a very different case is presented, for no act of service whatever was performed by the plaintiff in their introduction to the defendant, or by which they were induced to deal with him in the course of his business. As to those individuals the plaintiff in no manner or way interfered. He performed no act, subjected himself to no inconvenience, and conferred no benefit upon the defendant; but whatever was done in the way of securing them as customers was done by other persons, who were not acting for, or in behalf of the plaintiff, or at his instance. What they did was done independently of the plaintiff, and could not legally form a consideration for the payment by the defendant to him of this commission. These persons became customers of the defendant of their own volition, influenced, it is true, so far as an introduction could influence their action, by the persons introduced to the defendant by the plaintiff. But what took place was in no manner dependent upon the act, authority, direction or concurrence, of the plaintiff. And in that state of the relation of these parties, the dealings of these customers with the defendant formed no consideration for an agreement on his part to pay to the plaintiff commissions. He conferred as to them no benefit upon the defendant, neither did he subject himself to any inconvenience or injury, by reason of the fact that these persons were secured as customers for the defendant. And when that may be the fact, no legal consideration will exist for the support of a promise of the description of that found by the referee, relating to the business of these customers with the defendant, who were introduced to him, not by the plaintiff, but by the persons he had introduced, acting solely and exclusively in obedience to their own inclinations. For to create a legal consideration which will support a promise, there

must be at least some benefit conferred upon the one party, or some injury or inconvenience sustained by the other. (*Ainsworth v. Backus*, 5 Hun, 415; *Freeman v. Freeman*, 43 N. Y., 34, 39.)

Before the commencement of the action the plaintiff had received from the defendant the sum of \$300 on account of the commissions, and upon the understanding that this was all he was entitled to out of these dealings of the defendant he executed and delivered to him a receipt in full. This proved to be a misapprehension, as the fact is found to have been known at the time to the defendant himself. The plaintiff acted under this misapprehension in giving the receipt. There was, as the referee has found the fact to be, a larger amount due to the plaintiff than the sum he so received, and, under this state of facts, the referee was right in concluding the receipt not to form a legal defense against the plaintiff's action. It was open, as receipts usually are, to explanation, and by that which was given it was made to appear that the plaintiff was not bound by it beyond the fact that it was evidence that he had received this sum of \$300. There was no consideration whatever for the statement that it was received in full, and under the misapprehension existing, which was known to the defendant not to be correct, he could not insist upon the receipt itself as a legal defense to the action. The judgment from which the appeal has been taken should be modified so far as to restrict and limit the accounting to the commissions arising out of the dealings with the defendant, of the persons introduced to him by the plaintiff, and as so modified it should be affirmed, without costs to either of the parties.

DAVIS, P. J., and BRADY, J., concurred.

Judgment modified as directed in opinion, and affirmed as modified, without costs to either party.

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FALL BROOK COAL COMPANY, RESPONDENT, v. RICHARD  
HECKSHER, JR., APPELLANT.

*Contempt of court—actual loss or injury must be proved, to support a fine to indemnify the party injured, imposed under section 2281 of the Code of Civil Procedure—when a fine imposed under section 2281 cannot be changed on appeal to a fine for punishment—proper order to be entered in such cases.*

Upon the failure of the defendant to appear and answer, as he was required to do by an order made in supplementary proceedings, he was adjudged to be in contempt, and fined the sum of \$834.63, the amount of the judgment, and ten dollars costs.

*Held*, that as it was not proved that the plaintiff had sustained actual loss or injury, or had been deprived by the misconduct of the defendant of the amount of his judgment, there was no foundation for imposing this fine.

That although the court had power to impose, in addition to the fine for indemnity, a further fine by way of punishment, not exceeding the sum of \$250 and costs and expenses, yet, as it had not exercised this power in this case, the appellate court could not reduce the fine to the amount, or any portion of the amount which might have been prescribed by way of punishment.

*Erie Railway v. Ramsey* (45 N. Y., 637), and *DeJonge v. Brenneiman* (31 Hun, 382) distinguished.

That the court should have fined the defendant, by way of punishment, in a sum not exceeding \$250, in addition to the plaintiff's costs and expenses, and have directed his imprisonment until he should appear and submit to an examination concerning his property, and pay the fine with the costs imposed upon him.

APPEAL from an order, made at a Special Term, adjudging the defendant in contempt, and fining him the sum of \$834.63, with ten dollars costs.

*James L. Bishop*, for the appellant.

*Crane & Lockwood*, for the respondent.

DANIELS, J.:

The defendant failed to appear and answer, as he was required to do by an order made in supplementary proceedings, and that failure was repeated on a second occasion. It was for that he was required to show cause why he should not be punished for his contempt. And, as he was shown by the affidavits to be clearly in contempt, he was legally liable to punishment for that cause. But while the



order recited that his misconduct did actually defeat, impair, impede or prejudice the rights of the above named plaintiff, as it was required it should do, by section 2281 of the Code of Civil Procedure, it did not follow, from that circumstance alone, that he was liable to be fined, as he was, the amount of the judgment which had been recovered against him. For the degree of punishment to be inflicted has been limited, by section 2284 of the same Code, to a fine sufficient to indemnify the aggrieved party for any actual loss or injury produced by the misconduct. And, as it was not proved by the affidavits that the plaintiff had sustained actual loss or injury, or had been deprived by the misconduct of the amount of his judgment, there was no foundation for imposing this large fine upon him. To sustain the imposition of a fine for loss or injury, the fact of the existence of the loss must first be proved by legal evidence. Without such proof, no authority exists for fining the delinquent party to compensate such loss. (*De Jonge v. Brenneman*, 23 Hun, 332.) And the fine in this case was imposed, not by way of punishment, but wholly by way of indemnity, and for that it is devoid of all legal foundation.

The court had the further power, in addition to that authorizing a fine for indemnity, to impose a fine upon the defendant by way of punishment, not exceeding the sum of \$250, in addition to the costs and expenses.

But that power was not exercised in this case. No fine was imposed upon him by way of punishment for his misconduct, but it was wholly for the purpose of indemnity, and the court accordingly cannot reduce the fine in this instance to the amount, or any portion of the amount, which, under this part of the same section, might have been prescribed by way of punishment for the defendant's misconduct.

A reduction in the fine in a proper case may undoubtedly be made, as was done in *Erie Railway Company v. Ramsey* (45 N. Y., 637, 655), and *De Jonge v. Brenneman* (*supra*). But there the fines which were imposed were in part supported by the facts, while here the fine is wholly unsupported by the facts made to appear upon the hearing. For it was entirely devoted to the object of indemnifying the plaintiff against loss or injury, when no loss or injury whatever was made to appear. What the court should

have done in this condition of the evidence, was to have fined the defendant, by way of punishment, in a sum not exceeding the amount of \$250, in addition to the plaintiff's costs and expenses, and then direct his imprisonment, as that has been prescribed by section 2285 of the Code, until he should appear and submit to an examination concerning his property, and pay the fine with the costs imposed upon him. That authority was not exercised in any form, and, accordingly, the case presents no ground for modification, but it is one wholly for reversal.

The order which was made should be reversed with the usual costs and disbursements, and the case should be remitted to the Special Term for a further hearing, there to be proceeded with in conformity with this opinion.

DAVIS, P. J., and BRADY, J., concurred.

Order reversed, with ten dollars costs and disbursements, and case remitted to Special Term.

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HENRY A. ROOT AND NEWELL MARTIN, RESPONDENTS, v.  
FREDERICK P. OLCOTT, AS RECEIVER OF THE WALL  
STREET BANK, APPELLANT.

*Cashier of a bank—he may employ an attorney to collect a claim without any resolution of the board of directors, although that board has appointed an attorney and counsel to attend to its legal affairs.*

Upon the trial of this action brought to recover, from the receiver of the Wall Street Bank, a sum claimed to be due for services rendered by the plaintiffs, as counsellors-at-law, it appeared that the cashier of the bank had, without any resolution of the board of directors, and without the knowledge of any of the officers of the bank, retained the plaintiffs to collect certain claims, and that the plaintiffs, under this retainer, rendered services and made disbursements; that in many matters they acted under the direction of the general counsel of the bank, who, it appeared, were to some extent authorized to control the movements of the plaintiffs, and who ultimately took upon themselves the management of these claims as well as of the other affairs of the bank.

*Held*, that the act was within the scope of the general authority of the cashier, and that he was authorized, without any formal vote of the board of directors, to employ attorneys to collect the claim. (Per BRADY and DANIELS, JJ.; DAVIS,

P. J., dissenting, upon the ground that where the bank has its duly authorized attorney and counsel, appointed by the board of directors, to take charge of its land, business and affairs, the cashier has no general authority which empowers him to retain other attorneys or counsel for the bank at his discretion or pleasure.)

APPEAL from a judgment in favor of the plaintiffs, entered upon the report of a referee.

*Edward H. Hobbs*, for the appellant.

*Ira D. Warren*, for the respondents.

BRADY, J. :

This action was brought to recover from the receiver of the Wall Street Bank a sum claimed to be due for services rendered by the plaintiffs as counsellors-at-law, and upon a retainer of the Wall Street Bank before its dissolution. The questions involved are, first, whether the plaintiffs were retained by the Wall Street Bank in such manner as to make that corporation liable, and if yea, what was the value of the services rendered.

It appears from the record that the plaintiffs, prior to August 13, 1883, were the attorneys of Cecil, Ward & Co., and as such had commenced a suit against one Ducker. On that day the firm just named failed, heavily indebted to the bank, but having large claims against one Stedman, one Saunders and others, the failure of the firm being caused by Stedman. On the next day, namely, August 14, 1883, the plaintiff Root went to the Wall Street Bank and saw the cashier, John B. Dickenson, with whom he had a conversation about the assets of Cecil, Ward & Co., and the result seems to have been that Mr. Dickenson, who appears to have had entire charge of the relations of the bank with the broken firm, effected an arrangement by which Cecil and Ward turned over to the bank all their assets, including the claims against Ducker and the Stedmans; when, according to the testimony on behalf of the plaintiffs, the latter were by Mr. Dickenson directed to collect or prosecute the claims for the bank, for which services the bank would pay them. The plaintiffs, upon this retainer, rendered services and made disbursements, acting in many matters under the direction of Messrs. Shearman and Stirling, the general counsel of the bank, who, it seems, were to some extent authorized to control the movements of

the plaintiffs, and who ultimately took upon themselves the management of these claims as of the other affairs of the bank. It is not understood that there is any dispute as to the retainer in the manner stated, the contention being that the cashier had no authority to bind the bank unsupported by the concurrence of the directors, either by resolution or knowledge of and acquiescence in the acts of the plaintiffs in behalf of the bank.

As will have been observed from the statement of facts just made, the cashier retained the plaintiffs without authority by any resolution of the board of directors and without the knowledge of any of the officers of the bank. Was it within the scope of the general authority of the cashier to employ an attorney for the purpose of collecting outstanding claims due the bank? If it was, then the liability of the bank was established beyond peradventure, inasmuch as the evidence warrants the finding as to the retainer, and there is no reason, therefore, for interfering in the conclusion expressed in that regard.

The power and authority of a cashier have been stated, discussed or defined in many cases. "He is," said Justice SWAYNE, "the executive officer through whom the financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its financial securities." (*Merchants' Bank v. State Bank*, 10 Wall, 604, 650; see, also, to the same effect, *Bridenbecker v. Lowell*, 32 Barb., 9, 17; *Wallace v. First Parish in Townsend*, 109 Mass., 263.) It has also been quaintly observed that, contrasted with the directors, he was the hands and they the mind of the corporation. And, again, the directors have been likened to the judge and the cashier to the clerk of the court, the former adjudicating and directing, and the latter executing the mandate. (*Chemical Bank v. Kohner*, 8 Daly, 530.) And it has also been said not only that much of his authority must be implied from the nature of his business, its necessities, its customs and usages (*Farmers and Mechanics' Bank v. B. and D. Bank*, 26 How. Pr., 5, 6, 7), but that for many purposes the officers and agents of the corporation, of which he is one, may employ persons to perform services for it; and such employment being within the scope of their duty, binds the corporation. (*Hooker v. Eagle Bank*, 30 N. Y.,

85.) And it has been expressly declared that a managing officer or cashier has authority, without a formal vote of the board of directors, to employ counsel. (Taylor on Priv. Corp. Having Capital Stock, § 202; *Wallace v. First Parish in Townsend*, *supra*.) To the same effect, see *American Insurance Company v. Oakley* (9 Paige, 496); *Peterson v. The Mayor* (17 N. Y., 449); *Mumford v. Exchange Bank* (5 Denio, 355, 359); *Bristol Bank v. Keavy* (128 Mass., 298); *Frost v. Domestic Sewing Machine Company* (133 id., 563); *Western Bank v. Gilstop* (45 Mo., 419); *Southgate v. Atlantic and Pacific Railroad* (61 id., 89, 94).

In *Wallace v. First Parish in Townsend* (*supra*) it was said of the treasurer of the parish that it was his duty to collect the notes and other securities belonging to the parish, and that he had the incidental power to commence a suit on them, and for this purpose to employ counsel. And in *Bristol Bank v. Keavy* (*supra*) it was held that it would be a great obstacle to the management of savings banks and other corporations if no suit for the collection of a debt could be instituted except by a vote of the directors or trustees; and, indeed, in all the cases cited the power was recognized and commended or approved, as it should be.

It would be a very easy task to array a variety of reasons why such a power should not only be regarded as incidental, but indispensable for the protection of the property of corporations. Its abuse, if any should exist, can be speedily remedied by the removal of indiscreet officers. The reported cases falling into line on this subject could be multiplied if necessary.

There are a series of decisions, it is true, which would seem to militate against the existence of the power mentioned, but they do so, if at all, only inferentially. For example, a cashier has no power to assign or transfer non-negotiable paper without authority of the directors, duly given (*Barrick v. Austin*, 21 Barb., 241); or to make an agreement that an indorser of a promissory note shall not be liable (*Bank of U. S. v. Dunn*, 6 Peters, 51); *Bank of Metropolis v. Jones*, 8 id., 12; *Bank of Whitehall v. Tisdale*, 18 Hun, 151; affirmed 84 N. Y., 655); or, by reason of his official position, to bind the bank as an accommodation indorser (*West St. L. Savings Bank v. Shawnee Co. Bank*, 95 U. S., 557); or to settle an account, taking private notes and drafts and giving a

receipt in full (*Sandy River Bank v. Merchants' Bank*, 1 Biss., 146); or to bind the bank by a bond of indemnity to the sheriff to save him harmless in executing process in favor of the bank (*Watson v. Bennett*, 12 Barb., 196); or to bind the bank as a gratuitous bailee. All these prohibitions, however, clearly do not relate to powers incidental to the authority to collect the debts of the bank. They relate to the disposition of its property absolutely or by compromise, or to contracts absolute and independent in themselves and totally distinct from that which is designed to insure such collection, and undoubtedly not within the usual duties of the cashier, discharged without special resolution of the directors. The power and duty to collect necessarily include authority to set the legal machinery in motion to accomplish that result, and debts, it may well be conjectured, must be lost if, in some emergency requiring the utmost dispatch, the cashier could not act until the board of directors crept together to debate and to decide upon what was to be done.

The first question is thus successfully answered for the plaintiffs, and renders the discussion of a collateral proposition unnecessary, namely: Whether, if the cashier exceed his authority, the bank was not liable on an implied contract, about which much may be said in favor of the plaintiffs.

The remaining question is whether the plaintiffs were entitled, on the proofs given, to the amount awarded by the referee. From an examination of the evidence bearing on this subject, the conclusion has been reached that the whole amount of the claim should not have been allowed. The statements of the plaintiffs are not in entire harmony, and their difference leads to uncertainty. The services rendered as to the Ducker claim were in part performed before the retainer by the bank, and there should be no doubt that the sum earned in that way was deducted from the claim. It was variously estimated at from fifty to one hundred and twenty-five dollars. It is true the plaintiffs insist that Mr. Sanxay, who was examined on behalf of the defendants, is a hired expert; but if so, that does not justify the inference of partiality. He seems to have testified cautiously and with the intention of giving to the plaintiffs all they deserved. The amount they claim rests, it must be said, upon their evidence,

and although a lawyer may be the best judge of the value of his own services, he may nevertheless under or overestimate it, and his judgment cannot in all cases be regarded as conclusive. Here the impression left on the mind, in consideration of all the proof on the subject, is that the sums stated by Mr. Sanxay, in all amounting to \$960, should have been adopted by the referee, in addition to the disbursements proved to have been made, namely, \$61.41, making in all \$1,021.41.

The judgment should be modified, therefore, by reducing the finding to that amount and interest thereon, and as so modified the judgment should be affirmed, without costs to either party.

DANIELS, J.:

On the theory maintained as to the effect of the evidence, there should be a new trial. But it was in conflict on the subject of value, and the referee does not seem to have erred in following that given for the plaintiffs, and that entitles them to an affirmance.

DAVIS, P. J.:

Where a bank has its duly authorized attorney and counsel appointed by the board of directors to take charge of its law business and affairs, the cashier has no general authority which empowers him to retain other attorneys or counsel for the bank at his discretion or pleasure. The action of the board of directors in appointing the attorney and counsel of the bank takes away from the cashier all implied authority to do the same thing with respect of any portion of its business.

Where a cashier, under such circumstances, has assumed to employ another attorney, it must be shown that his act has been recognized or approved by the board in some form that amounts to a ratification of the act. I dissent, therefore, from the opinion of the court and its conclusion, but as my brother DANIELS is for affirmance and my brother BRADY for affirmance with a modification, I concur in the modification proposed by my brother BRADY, which will result, therefore, in an affirmance of the judgment as modified.

Judgment modified as directed in opinion, and affirmed as modified, without costs.

IN THE MATTER OF THE PETITION OF CHARLES LEWIS AND  
OTHERS FOR LEAVE TO BE MADE PARTIES PLAINTIFF IN THE  
ACTION OF ISAAC BIERMAN AND OTHERS v. LEWIS C.  
HAKE AND OTHERS.

*Action to compel an accounting by a general assignee — right of other creditors to come in after judgment and prove their claims — they cannot be compelled to contribute their share of the costs and expenses — costs and expenses of plaintiff, how paid.*

After an action, brought by a judgment creditor to compel a general assignee to account, had been sent to a referee to take and state the accounts of the assignee and ascertain the amounts due and owing to the creditors of the debtor, other creditors applied for an order allowing them to intervene and be made parties plaintiff.

*Held*, that the application was properly denied, as it was not necessary that the applicants should be brought into the action as additional plaintiffs, as the action, though brought by one creditor, was in reality for the benefit of all the other creditors as well as for himself, the judgment in such actions being uniformly required to provide for bringing in all the other creditors and affording them an opportunity to present and prove their demands and participate in the distribution of the estate under the final judgment.

A provision in a judgment entered in such an action, imposing as a condition upon which creditors were to be allowed to come in and prove their claims, that they should contribute their proportion of the costs and expenses of the action to be settled by the referee, is unauthorized and will not be enforced.

*It seems*, that in such a case a proper allowance for the costs and disbursements of the plaintiffs will be made in the final judgment to be paid out of the fund.

APPEAL from an order denying the application of the above-named petitioners to be allowed to intervene and be made parties plaintiff in an action mentioned in the title between Isaac Bierman *et al.*, plaintiffs, and Lewis C. Hake *et al.*, defendants.

On the 15th of November, 1883, Lewis C. Hake and Joseph A. Hake made a general assignment for the benefit of creditors to William H. Zeltner. In the month of February, 1885, the above-mentioned Isaac Bierman *et al.*, creditors of these assignors, brought an action in this court against the surviving assignor and the assignee Zeltner for an accounting. The assignee only answered. On the 13th of October, 1885, an order was made referring it to Marcus Stine to take and state the account of the assignee and, also, the amount due and owing to each of the other creditors of the assignors,



“who shall come in under this order, seek the benefit of this action and contribute to the costs and expenses thereof, such contribution to be settled by the said referee. \* \* \* Such persons, not parties to this action, who shall come in before the said referee to prove their debts shall, before they are admitted as such creditors, contribute their proportion of the costs and expenses of this action to be settled by the said referee.” In the latter part of May, 1886, the petitioners asked leave to be made parties plaintiff and to intervene.

*Nathan Lewis*, for the petitioners, appellants.

*Blumenstiel & Hirsch*, for the respondents.

DANIELS, J. :

While it is true that the applicants, as creditors, are interested in the proceedings taken by the plaintiffs in the action to settle the affairs of the assignee for the benefit of creditors, it was still not necessary that they should be brought into the action as additional plaintiffs under the authority given for that purpose by section 452 of the Code of Civil Procedure. The action has proceeded to judgment, and an accounting has been directed and liberty secured to the other creditors to present and prove their accounts. To open the case and add the petitioners as plaintiffs in the action would be to complicate and prolong the litigation without securing any adequate benefit. The rights of all the parties can be as well considered and determined without bringing in additional plaintiffs in the action, as they could be if all the creditors had joined in the action.

In this class of cases the action when brought by one creditor is in reality for the benefit of all as well as himself, and the judgment for the accounting is uniformly required to provide for bringing in all the other creditors and affording them an opportunity to present and prove their demands and participate in the distribution of the estate under the final judgment, and by that judgment all their rights and interests will be declared and protected and a proper allowance made for the costs and disbursements of the plaintiffs in the action. The practice upon this subject was clearly explained in *Kerr v. Blodgett* (48 N. Y., 62, 67), and by following it every

possible chance of injustice to either of the creditors will be excluded.

It is true that the judgment in this action, by its language, imposed conditions upon the creditors which the practice required to be followed does not sanction. But as they were not parties in fact to the judgment at the time when it was directed, they cannot be bound by these directions. The plaintiffs had no authority for imposing upon other creditors the payment of any part of the costs or disbursements in the action, as a condition to their right to appear and present and prove their claims. The action could not be carried to a successful determination without affording the other creditors full liberty to present and prove their claims, without subjecting them to the payment of any costs or disbursements whatever. It was the purpose of the litigation to bring in all these parties and to afford them an opportunity to be heard in support of their claims, before a final judgment can regularly be reached, and that the law, notwithstanding the form in which the judgment has been entered, must secure to each of the creditors. If either should be excluded from the right to present and prove his demand without first paying a portion of the plaintiff's costs, no final judgment in the action could be recovered until the erroneous direction excluding the party for that reason should be corrected. As the case has been presented, this right of the creditors to prove their claims, without being restricted as to the terms on which they may come into the case, should be as it has been declared by the court. It will expedite the litigation and prevent embarrassment in finally closing up the estate, and, in the end, whatever costs the plaintiff may be entitled to will be provided for out of the fund benefited and distributed by the proceeding.

The order as it was made was accordingly right, and it should be affirmed, but without costs.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed, without costs.

IN THE MATTER OF THE PETITION OF JACOB LORILLARD,  
RESPONDENT, v. HORACE BARNARD, AN ATTORNEY-AT-LAW,  
APPELLANT.

*Lien of an attorney upon moneys collected under a judgment — when he may retain therefrom the amount due to him for services rendered in other proceedings.*

Upon an appeal from an order directing a reference to take proof and report how much of a sum of \$9,818.35 an attorney was entitled to retain as compensation for his services in an action, it appeared that the action in which the money was collected was prosecuted under an agreement entered into between himself and the plaintiff, by which the latter agreed, in lieu of paying fees, that the attorney should prosecute that and other suits for one-fourth of the net amounts which should be recovered on the judgments. In addition to the one-fourth which he was by the agreement entitled to retain, the attorney claimed to retain the residue upon the ground that he had been employed in other legal proceedings, and had rendered services and made disbursements in them for the plaintiff, and also that the plaintiff had violated his agreement with the attorney concerning legal proceedings in other actions covered by the agreement, and thereby rendered himself liable for the damages which the attorney had sustained.

*Held*, that the attorney had no right to reserve or retain the said moneys to secure the payment of any damages arising out of the failure of the plaintiff to perform his contract, but that he was entitled to retain the amount due to him for the services performed and the disbursements made in the legal proceedings for which he had not already been compensated.

*Williams v. Ingersoll* (89 N. Y., 508) distinguished.

APPEAL from an order directing a reference to take proof and report how much of a sum of \$9,818.35 an attorney was entitled to retain as compensation for his services in an action in the City Court of Brooklyn.

*Horace Barnard*, appellant, in person.

*Asa Bird Gardiner*, for the respondent.

DANIELS, J.:

The action wherein the money was collected was prosecuted by the petitioner, as plaintiff, against William T. Clyde and another, as surviving partners. The judgment was recovered for the sum of \$30,165.54, and it has all been collected by the attorney except the sum of \$2,415.55. The object of the petition and the proceeding

instituted by it was to obtain an order requiring the attorney to pay over so much of the amount received by him as the petitioner was entitled to receive. The action in which the money was collected was prosecuted by the attorney under an agreement between himself and the petitioner, by which the latter agreed, in lieu of paying fees, that the attorney should prosecute this and other suits for one-fourth the net amounts which should be recovered by the judgments. The attorney accordingly was entitled to retain this one-fourth under the authority of this agreement. As to that no controversy seems to exist between these parties. But as to the residue of the money collected upon the judgment, the attorney has set forth, by way of justification for his refusal to pay it over, the fact that he had been employed in still other legal proceedings, and had rendered services and made disbursements in them for the petitioner, and that the petitioner also had violated his agreement with the attorney concerning certain legal proceedings in actions within this agreement, thereby rendering himself liable to make compensation to the attorney for the loss or damages he had so sustained. As to this latter branch of the positions taken by the attorney it is not necessary that any particular time shall be devoted to its examination, for the law has not undertaken to reserve or secure to the attorney a lien upon his client's papers or money for damages arising out of the non-performance of a contract when no such right shall, by their agreement, be reserved in favor of the attorney. The appropriate mode for recovering such damages is by way of an action, as in other cases where parties fail to perform or observe their agreements.

But as to the services performed and disbursements made in other legal proceedings, for which the attorney has not already been compensated, the case stands upon different grounds. For it has been the object of the law to maintain in the attorney's favor a lien, or right of detention, of his client's papers and moneys, until he shall be paid what the latter has become legally bound to pay him for his services and disbursements. This lien, or right of detention, has been urged in behalf of the petitioner, to be restricted to the services performed and disbursements made in the action, in which the judgment itself has been recovered. And *Williams v. Ingersoll* (89 N. Y., 508) has been relied

upon as conclusively establishing this proposition; but the decision does not proceed to this extent. It was considered and held there that the lien of the attorney upon the judgment itself is confined to the services and disbursements in the action, and to a sufficient amount secured by it to satisfy this lien. But the point was not then before the court whether the attorney, after he had collected the judgment and had the money in his possession, would, or would not, be entitled to retain it until his entire account for services and disbursements in other legal proceedings should be settled by the party otherwise entitled to receive the money. That is a very different question from the one which was considered and decided in that case, for it depends upon the obligation of the attorney to surrender what he has actually become possessed of, belonging to his client, without his other legal claims being liquidated or settled. As to the papers which may pass into his possession, this general lien or right of detention has been uniformly maintained by the authorities. To a great extent it has been made dependent on the fact of possession, and the possession of the client's funds would seem to be within the control of the same principle. This subject was examined in *St. John v. Diefendorf* (12 Wend., 261), where it was stated, in the course of the opinion, that the attorney would have this right of detention, of whatever belonged to his client, after it had lawfully passed into the possession of the attorney. This principle was made the subject of further consideration in section 629 of Wharton on Agency, etc., where the distinction is taken between the right of the attorney to charge a judgment by way of lien, and of retaining that of which he may have become possessed by the permission and authority of the client. In the former case it is declared that the lien will not extend beyond compensating the attorney for his services and disbursements in recovering the judgment, while in the latter, the money or papers in the possession of the attorney may be retained for a general balance of his account for services and disbursements. It is said there that "the distinction between the retaining lien and the charging lien in this respect is plain. In the one case the fund is in the attorney's hands, and the law of lien property applies, and the attorney can charge for his general balance. In the other case the fund is not yet recovered,

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FIRST DEPARTMENT, OCTOBER TERM, 1886.

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and the attorney, not having the fund in hand, ought, if he have a lien at all, to be restricted to that for statutory fees." And the decision made in *Matter of Knapp* (85 N. Y., 284) proceeds upon this distinction, for there it was said, that "An attorney has a lien for his costs and charges upon deeds or papers, or upon moneys received by him on his client's behalf, in the course of his employment, is not doubted, nor does it stand upon questionable foundations." (Id., 293.) And, as far as the case of *Bowling Green Savings Bank v. Todd* (52 N. Y., 489) extends, it sanctions this principle, which is entirely distinguishable from that which was considered and applied in the decision of *Williams v. Ingersoll* (*supra*). And these authorities maintain the rule to be, where the attorney has lawfully acquired the possession of the papers or money of his clients, under the authority of the latter, he shall not be obliged by the order of the court to surrender either until his just demands against the client for services and disbursements have been settled and paid.

The contract under which these moneys were collected and received by the attorney does not exclude, and is not in any manner inconsistent with, this right of detention or lien secured to the attorney, for it did not impose upon him the obligation, at all events, of paying over the money collected to the petitioner after deducting his own one-quarter. An obligation to pay, it is true, is to be implied from the agreement, but where this may be the relation of the parties the obligation is necessarily subject to the incidental rights of the attorney, not surrendered or abandoned by the making of the agreement. Upon the subject of the attorney's lien on moneys passing into his possession the contract was entirely silent. Neither expressly nor by implication did it attempt to regulate this right or obligation of the attorney. That was, on the other hand, left to the legal principle applicable to the relation existing between these parties, that when the moneys of the client were collected by the attorney he should pay them over, after deducting what should appear to be justly due him for other services he had rendered his client and the disbursements made in the course of such employment. In this case, therefore, the petitioner was not entitled to the payment of the moneys collected upon this judgment until the legal claims of

the attorney for his services and disbursements in other proceedings, which had not been adjusted and settled, shall be ascertained and paid.

The order of reference excluded the right of the referee to inquire into or investigate the claims made by the attorney for compensation for these services and disbursements in other proceedings. To that extent it was not entirely just to the attorney, and while the reference was proper to ascertain the amount due from the attorney to the petitioner, the order directing it should be so far enlarged as to include these other charges and demands for which the attorney claims and has the right to retain the other three-fourths of the moneys collected by the judgment.

As so modified the order should be affirmed, with the usual costs and disbursements awaiting the result of the proceeding.

DAVIS, P. J., and BRADY, J., concurred.

Order modified as directed in opinion and affirmed as modified, with ten dollars costs and disbursements to abide event.

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JOHN H. STARIN, APPELLANT, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK AND OTHERS, RESPONDENTS.

*Leases of wharfs in New York by the commissioners of the sinking fund — void if not let at public auction—1882, chap. 410, secs. 170, 180, 716—right of a railroad company to acquire a lease of a ferry franchise not having either end at the railroad terminus—1884, chap. 193—in what cases an action to restrain illegal acts will lie by a taxpayer under chap. 531 of 1881.*

Upon the trial of this action, brought by the plaintiff as a taxpayer under chapter 531 of 1881, against the defendants, the commissioners of the sinking fund, to set aside a lease of ferry franchises and a wharf, it appeared that the wharf was situated at the foot of Whitehall street, and that one of the ferry routes extended from that street to Staten Island and the other from the same point to Bay Ridge, Long Island. The franchises, after having been advertised in the notice of sale, to be let for the term of eight years and eleven months from June 1, 1884, were sold to the defendant, the Staten Island Rapid Transit Railroad Company. The notice of the sale fixed the rental of the wharf at the sum of \$10,000, and stated that the ferry franchises were to be offered at an upset price of five per cent of their gross receipts. The sale was made as

provided in the notice, against the objections that each ferry route should be separately sold, and that the rental for the wharf property should be fixed by the price for which the purchaser would be willing to take it at an auction sale. *Held*, that the authority conferred by section 180 of chapter 410 of 1883 upon the commissioners of the sinking fund to lease the wharf along with the franchise of a ferry, was qualified by the direction contained in section 716 of the same act, that "all leases, other than for districts appropriated by said department to special commercial interests, shall be made at public auction to the highest bidder."

That as the commissioners had disposed of the lease-hold term of the wharf at the fixed rental of \$10,000, in violation of the provisions of this act, their proceedings were illegal; and should, in so far as they had been consummated, be vacated and set aside.

That as the plaintiff possessed the qualifications prescribed in the act of 1881, and had given the bond required by it, he was entitled to maintain this action, and that the fact that he was a bidder at the sale, and was interested in the use of the wharf and the ferry franchises previous to the time at which the sale was had, did not disqualify him from so doing.

The defendant railroad company was incorporated, under the general laws of this State, to construct and operate a railway from a point on the shore of the lower bay of New York, at or near New Dorp Lane, to or near the foot of the church road in the village of Port Richmond.

Chapter 193 of 1884 authorizes any steam railroad company incorporated under the laws of this State, with a terminus in the harbor of New York, to purchase or lease boats propelled by steam, or otherwise, and operate the same as a ferry, or otherwise, over the waters of the harbor of New York, to any point distant, not more than ten miles from said terminus.

*Held*, that while the act was sufficiently broad to entitle the company to acquire the necessary boats and franchise and to operate a ferry from the terminus of its road to the city of New York, it does not appear to confer upon the company the power to lease another distinct ferry, as it proposed to do, to be operated from the city of New York to Bay Ridge on Long Island.

That as the sale was made, so far as the wharf was included in it, for a distinct price, incapable of being separated, it must, even if authorized in part, be wholly set aside.

APPEAL from a judgment, recovered at a Special Term dismissing the plaintiff's complaint.

*James McNamee*, for the appellant.

*Stewart & Boardman*, and *D. J. Dean*, for the respondents.

DANIELS, J. :

The action was brought by the plaintiff as a taxpayer, under chapter 531 of the laws of 1881, to restrain the completion of the



execution of, and to set aside a contract for, a lease of a wharf and ferry franchise in the city of New York. The wharf and bulkhead is situated at the foot of Whitehall street, and one of the ferry routes extended from that street to Staten Island, the other from the same point to Bay Ridge, in the town of New Utrecht, on Long Island.

The franchises were advertised in the City Record to be let to the highest bidder for the term of eight years and eleven months, from June 1, 1884. The rental of the wharf property was previously fixed and mentioned in the notice at the sum of \$10,000, and the ferry franchises were to be offered at an upset price of five per cent of their gross receipts. The sale took place as it was advertised, and the defendant, the Staten Island Rapid Transit Railroad Company, purchased the term and franchises, for which a lease was to be executed and delivered to it. Before the sale was made objections were presented to the right of the sinking fund commissioners to make it in this manner. It was urged that each ferry route should be separately sold, and that the rental for the wharf property should be fixed, alone, by the price for which the purchaser would be willing to take it at an auction sale. These objections were disregarded and bids were refused at the sale proposing a higher rental for the wharf and an advance over the upset price for the ferry franchises, it being determined at the time of the sale that the rental had been fixed for which the lease of the wharf was to be made. The plaintiff deeming this to have been an unlawful disposition of the leasehold interest in the wharf, and of the ferry franchises sold with it, as one of the taxpayers of the city brought this action to restrain and prevent the completion of the sale, by the execution and delivery of the lease, and to vacate and annul the sale itself.

He was a bidder at the sale, and was interested in the use of the wharf and the ferry franchises previous to the time of the making of the sale, and because of his interest the objections made by him to the authority of the sinking fund commissioners to make the sale, in the manner in which it took place, it has been urged should not be considered, and that this action cannot be maintained by him. But the law contains nothing disabling a taxpayer who may have been desirous of obtaining the leasehold interest, or who bid at the

sale, or previously owned a leasehold term in the same property, from maintaining such an action as this. What it requires is that the plaintiff shall be a taxpayer assessed for property to the amount, at least, of \$1,000, and that the requisite bond shall be executed and delivered, as that has been directed by the law. And that the plaintiff was such a taxpayer, and this bond has been executed and filed, appears as facts in the case, and that distinguishes this case from *Hull v. Ely* (2 Abb. N. C., 440). Under the provisions of the statute he was a person authorized to maintain the action, if, upon the facts appearing, the disposition proposed to be made of the property and ferry franchises was illegal. The object of this statute is to secure the protection of public property, and to subordinate the acts of officials in its disposition, or appropriation, to the restraints of the law. And it requires to be liberally construed and applied to carry this object into effect (*Ayers v. Lawrence*, 59 N. Y., 192); and under its provisions actions in part the same as this have been sustained and approved by the courts. (*Bird v. Mayor, etc.*, 33 Hun, 396; *Warrin v. Baldwin*, 35 id., 334.)

By a resolution adopted by the common council of the city of New York, and approved by the mayor on the 3d of November, 1875, a ferry was established to run from the bulkhead at the foot of Whitehall street in the city of New York to Staten Island, the franchise of which was directed to be sold at auction to the highest bidder. By another resolution adopted by the common council and approved by the mayor on the 4th of June, 1877, another ferry was established from the foot of Whitehall street to Bay Ridge, the franchise of which was also directed to be sold at auction to the highest bidder. This was also the mode provided by section 170 of chapter 410 of the laws of 1882 for the sale and disposition of city property including ferry franchises. It was thereby declared that the board of commissioners of the sinking fund should, "except as in this act otherwise specially provided, have power to sell or lease, for the highest marketable price, or rental, at public auction, or by sealed bids, and always after public advertisement and appraisal, under the direction of such board, any city property, except wharfs, or piers, but not for a term longer than ten years, nor for a renewal for a longer term than ten years." The same commissioners by section 180 of this act were further

empowered to lease "in the manner provided by law," along with the franchise of a ferry within said city, "such wharf property, including wharves, piers, bulkheads and structures thereon, and slips, docks and water fronts adjacent thereto, used, or required, for the purposes of such ferry, now owned, or possessed, or which may hereafter be owned or acquired, by said city." This authority so far qualified the exception contained in section 170 of the same act as to empower the commissioners to lease with the ferry franchises, the wharfs, piers, bulkheads and structures adjacent thereto, and required for the purposes of the ferry. But the exercise of the authority in this manner conferred upon the commissioners of the sinking fund was restrained by the provision that such wharves, piers, bulkheads or structures should be leased in the manner provided by law. That is the express language of the section itself, and it contemplates the existence of a restraint upon this power of leasing the wharves, piers, bulkheads and structures thereon. And this restraint seems to have been intended to be no other than that contained in section 716 of the same act which provided that "Said department may, in the name and for the benefit of the corporation of said city, lease any or all of such property for a term not exceeding ten years, and covenant for a renewal, or renewals, at advanced rents of such leases for terms of ten years each; but not exceeding in the aggregate fifty years. All leases other than for districts appropriated by said department to special commercial interests shall be made at public auction to the highest bidder." This section is contained in that part of the act which relates to the department of docks. But by the provision contained in section 180 of the act, that the lease shall be made in the manner provided by law, it appears to have been the object and design of the legislature to apply these directions contained in section 716 to leases made by the commissioners of the sinking fund, for the use of wharves, piers, bulkheads and structures thereon, required for the purposes of a ferry. The intention of the statute appears to be that in the disposition of this property the sales or leases of it should be made through the intervention of an auction or sealed proposals after public notice, properly advertising it. It was to give the public the advantages of competition in which interested parties should be brought together and the highest possible price obtained for the property to be sold, or leased. And

no reason can be perceived why the dock commissioners should be expressly restrained in this manner, and the commissioners of the sinking fund should be at liberty to disregard this restraint. The act, on the contrary, discountenances any such distinction, for it requires the commissioners of the sinking fund, in leasing wharves for ferry purposes, to proceed in the manner provided by law, and that manner of proceeding by section 716 is to put the property up at auction.

This direction of the law was disregarded in the notice published for the lease of the wharf property, which was not in a district appropriated to any special commercial interest, and the auction itself also proceeded in violation of this direction. For the leasehold property was put up at a fixed price of \$10,000 rental, and no change in that amount was permitted to be made, and no bid contemplating any change was received at the time when the sale took place. This was a violation of the direction given in the consolidation act for the leasing of this description of property. The law did not permit the rent to be determined by the commissioners, but that was to be done when not fixed by sealed proposals, by the persons attending at the sale, and by the highest bid offered for the lease. That it might not be a perfectly easy matter to comply with this direction of the law for the disposition of the wharf, will not justify the proceeding which was taken, for the language of the statute is imperative that the rental to be paid shall be fixed in the manner in which the prescribed sale is required to take place. But in reality the difficulty in the way of making the sale, in compliance with the direction of the statute, is more imaginary than real, for, by putting the ferry franchise, or franchises, together with the lease of the wharf, the bidders could very intelligently bid for both by indicating the rental to be paid for the wharf and the percentage on the earnings of the ferry to be paid for its franchise. No serious obstacle would stand in the way of carrying the law into execution in this manner and complying literally with its directions. That was not done at the auction which took place, through which the railroad company claims to have acquired the right to the use of the wharf and the franchises of each of these ferries.

The railroad company was incorporated, under the general rail-

road laws of this State, to construct and operate a railway from a point on the shore of the lower bay of New York, at or near New Dorp lane, to or near the foot of the Church road, in the village of Port Richmond. It was no part of its organization to acquire a ferry right, or to run or operate a ferry from the terminus of its road to the city of New York. And whatever right or authority it has since obtained for this purpose was acquired by it under chapter 193 of the Laws of 1884. This act provides that "Any steam railroad company incorporated under the laws of this State, with a terminus in the harbor of New York, is hereby authorized and empowered to purchase or lease boats propelled by steam or otherwise, and operate the same as a ferry or otherwise, over the waters of the harbor of New York to any point distant not more than ten miles from said terminus." And while this act is sufficiently broad to entitle the railroad company to acquire the necessary boats and franchises, and to operate a ferry from the terminus of its road to the city of New York, it does not appear to confer upon the company the power to lease another distinct ferry, as it is now proposed it shall do, to be operated from the city of New York to Bay Ridge, on Long Island. What the statute intended was that any railroad company having a road, with a terminus at the harbor of New York, should be empowered to reach the city by maintaining a ferry from that terminus to any other point not more than ten miles distant from this terminus. But the ferry route, extending from the foot of Whitehall street to Bay Ridge has no connection whatever with the terminus of the railroad company. It is, on the other hand, distinct and independent from the terminus of the railroad, having terminal points of its own, in which the railroad company is in no way concerned. And if it could acquire, under the authority of this statute, the lease of such a ferry route, it may acquire with equal propriety a lease of any route extending from any part of the city of New York, either to Long Island or the Jersey shore. And to confer such power upon the railroad company very clearly seems not to have been the design of this act. And if it was not, then the lease proposed to be made to the railroad company for the Whitehall and Bay Ridge route would be an illegal disposition of the property and franchises of the city, and liable to restraint and prevention under the act of

1881. This subject was considered in *Latham v. Richards* (12 Hun, 360), and an unauthorized disposition of public property was in that action restrained. And there is good reason why it should be, for if the railroad company had no power to purchase or accept, the lease of this ferry franchise, and the right to use the wharf, so far as it should be necessary, for that purpose, it might hereafter refuse to be bound by the lease, and abandon it as unauthorized to the city. And the commissioners of the sinking fund have not been empowered to place public property under a contingency of that description. The sale was made, so far as the wharf was included in it, for a distinct price, incapable of being separated, or apportioned to the different ferry franchises. And if it was unauthorized in part because of the inability of the railroad company to acquire the Bay Ridge route, it seems to follow that it must be held to be wholly unauthorized. But whether it be so held or not, as long as the commissioners disposed of the leasehold term for the wharf in violation of the provisions of the statute, their proceedings were illegal and they should be restrained and prevented from carrying them into effect, and so far as they may have been consummated they should be vacated and annulled. The judgment, therefore, should be reversed, and, as the facts are already found by the court in its decision, a judgment in conformity with these views should be entered in the action. And as this will dispose of the allowances no specific attention is required to be devoted to them.

BRADY, J., concurred.

DAVIS, P. J., taking no part in the decision.

Judgment reversed, and judgment ordered as directed in opinion.

GOTTLIEB WEBER, APPELLANT, v. NATHAN MANNE, AS  
ASSIGNEE OF S. SILBERSTEIN & CO., RESPONDENT,  
IMPLEADED, ETC.

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*Undertaking to secure a return of chattels—form of—Code of Civil Procedure,  
secs. 1698 and 1704.*

Under an attachment, issued in this action brought to recover the possession of a large number of articles, the sheriff took possession of a part or all of the articles. The defendant, to entitle himself to require a return of so much of the property as had been seized by the sheriff, presented an undertaking, executed by himself and two sureties, in a sum double the actual value of all the property, as it was stated in the affidavit made by the plaintiff, which recited that the plaintiff had caused a part only of the property to be replevied, and that the defendant, executing or giving the undertaking, required a return to him of the part of the chattels so replevied.

*Held*, that although this recital should not have been inserted in the undertaking the plaintiff was not prejudiced thereby, as it did not, in any way, qualify or diminish the liability of the persons executing it to respond for the value of all the chattels, the return of which might be secured by means of the undertaking.

APPEAL from an order approving the form of an undertaking given on behalf of the respondent in an action of replevin.

*Abram Kling*, for the appellant.

*Richard M. Henry*, for the respondent.

DANIELS, J. :

The action was brought to recover the possession of a large number of articles, a schedule of which was annexed to the affidavit of the plaintiff. The sheriff took possession of a part or all of the articles, and this defendant required a return of so much of the property as had been replevied by the sheriff, and, to entitle himself to that return, an undertaking was presented, executed by himself and two sureties, in the sum of \$2,830.64. This was double the amount of the actual value of all the property, as it was stated in the affidavit made by the plaintiff, and it was all, in that respect, which the defendant was obligated to do to entitle himself to the return of the property, according to section 1698 of the Code of Civil Procedure. For by that section, even if the

whole of the property mentioned in the affidavit has not been replevied, when the value of the different articles has not been stated, but a gross value placed upon them all, the entire value mentioned in the affidavit is to be deemed the value of the part replevied in the proceedings to procure a return thereof to the defendant. But this undertaking, without any evidence that such was the fact, recited that the plaintiff had caused a part only of the property to be replevied, and that the defendant, executing or giving the undertaking, required a return to him of the part of the chattels so replevied. And because of this recital, and the restriction of the liability of the parties executing the undertaking to the value of the chattels so replevied, it was objected to as not in compliance with what the law had required for this purpose. And this objection seems to have been well taken, for, as no separate value was given to either of the articles, the undertaking on behalf of the defendant, both by sections 1698 and 1704, was required to be for double the value, stated in the affidavit, of all the chattels. The former of these sections is clearly expressed to this effect, and there is no ambiguity in the latter, for it has required, by subdivision 2 of section 1704, that the undertaking shall be to the effect that the persons executing it are bound in a specified sum, not less than twice the value of the chattel as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if that shall be adjudged, etc., and accordingly the undertaking should have been in the usual form for this amount. And that would impose no unlawful burden either upon the defendant or his sureties, for they would in no event be liable for more than the value of the chattels replevied, the possession of which should be secured by means of the undertaking. That is the effect of this section. It provides first, to entitle the defendant to a return that he shall serve upon the sheriff a notice that he requires a return of the chattels replevied; and to obtain that return, where a separate valuation has not been placed on different articles, the undertaking in double the value mentioned in the plaintiff's affidavit has been made indispensably necessary; but at the same time the extent of the liability is limited to the value of the property obtained under it, and it is that of the chattels replevied.

But the additional statement in the undertaking that only a part



of the chattels had been replevied did not qualify the liability of the persons executing it, for whatever the chattels might be that were replevied, and the return of which should be secured by means of the undertaking, the sureties will be liable for no more than their value in case the plaintiff succeeds in maintaining his right to the recovery of their possession, and they would be liable to no more than that if no statement had been made in the undertaking asserting the fact to be that only a part of the chattels had been replevied. The law has not been framed in such a manner as to impose on the sureties any larger measure of liability than this in any event. It is for the value of the chattels replevied that they may be made liable, and for no liability beyond that. The case of *Diossy v. Morgan* (74 N. Y., 11), which arose and was decided under the preceding Code, is not in conflict with this construction, for all that was held there was that the persons executing the undertaking were estopped from denying that the property had been replevied and was in the possession of the sheriff. What that property was, or its value, the sureties were not held, by this case, to be estopped from proving, as a matter of fact, on the trial of an action brought against them on their undertaking.

The recitals in the undertaking that only a part of the property had been replevied cannot, therefore, be held to prejudice the plaintiff, for whatever amount of the property was replevied by the sheriff the persons executing the undertaking would be liable, to the plaintiff, if he succeeds in maintaining his action, and that is all that the sureties in the undertaking could be made liable for if it had been made out precisely in the form in which it should have been if it had complied with these sections of the Code.

The order from which the appeal has been taken should be affirmed, but as there was this defect in the undertaking, now considered not to be material, it should be without costs.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed, without costs.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
JOSE M. FERRER, AS ANCILLARY EXECUTOR, ETC., APPELLANT, v. THE COMMISSIONERS OF TAXES AND ASSESSMENTS, ETC., RESPONDENTS.

*Taxation — exemption of moneys deposited by a non-resident for investment here —*  
1 Revised Statutes, 389, section 5, as amended by chapter 176 of 1851, and 1 Revised Statutes, 419, section 3.

One William Maden, who resided in Cuba, died in August, 1884, having at that time on deposit with Moses Taylor & Co., of the city of New York, the sum of \$106,224, which had been placed by him in their custody for investment. The relator, who had duly qualified as his executor in Cuba, in order to get possession of the money so deposited, took out ancillary letters in this State, and thereafter demanded the money from Taylor & Co., who refused to pay it over.

Upon the hearing upon the return to a *certiorari*, brought to review the action of the respondents, in assessing the relator for the sum mentioned as personal property:

*Held*, that as the fund was sent here for investment by the deceased, and his will showed that it was his intention that a certain portion thereof, at least, should be invested in United States securities, it was exempt from taxation under the provisions of section 5 of 1 Revised Statutes, page 389, as amended by chapter 176 of 1851, and section 3 of 1 Revised Statutes, 419.

APPEAL from an order of the Special Term, directing judgment for the respondents on the hearing upon the return to a *certiorari*.

A. B. Cruikshank, for the appellant.

George S. Coleman, for the respondents.

BRADY, J.:

It appears from the record that William Maden, otherwise known as William Maden and Deacon, was, in his life-time, a capitalist, who resided at Cardenas, in the Island of Cuba. He died in August, 1884, and at the time of his death there was deposited with Moses Taylor & Co., of this city, the sum of \$106,224, which was by him placed in their custody for investment. He left a will appointing the relator, a resident of Cuba as it is understood, his executor, who qualified as such in Cuba, and, in order to get possession of the money deposited here and already referred to, took out ancillary letters and thereupon demanded the money from

Taylor & Co., who refused to pay it over. In the meantime the respondents, in the discharge of what they conceived to be their duty, assessed the relator, as executor, for the sum mentioned as taxable personal property, and on his application duly and properly made, refused to cancel the same. This proceeding which was instituted to review the propriety of the tax imposed upon the relator is regular in all respects, and presents, therefore, the abstract question of such propriety. The provisions of the Revised Statutes (1 R. S., m. p. 389, § 5, and 419, § 8, Laws 1851, chap. 176) declare that the agents of moneyed corporations or capitalists shall not be liable to taxation for any moneys in their possession or under their control, transmitted to them for the purpose of investment, and also that any bond, mortgage note, contract, account or other demand belonging to any person not being a resident of the State, if sent here for collection or deposited here for the same purpose, shall be exempt from taxation.

In the case of *Williams v. The Board of Supervisors* (78 N. Y., 561), these statutes were under consideration, and it was said that their provisions were clearly designed to afford to the foreign capitalist who invests his funds here every conceivable protection. The court said: "His capital cannot be taxed while awaiting investment. If the securities are taken by him out of the State, he may with impunity send them back to an agent here for the collection of principal or interest. And if, instead of being removed from the State, they are deposited here with an agent for collection, they are equally free. The capital is protected from taxation whether invested or uninvested, and whether the securities are taken away or remain here for collection."

"Nothing could be more plain," said the court, "than the policy and purpose of these exemptions. They are clearly intended to further the trade and commerce of the State, and to encourage and even invite the sending of foreign capital here for investment."

This unavoidable interpretation of the statutes referred to, their language, object and design being properly understood and carried out, disposes of the propriety of the taxation here complained of. There seems to be no appropriate answer, no presentation of any fact excepting the fund in question from the application of the rule thus pronounced. It is true that the respondents seek to sus-

tain the validity of the tax by asserting that the fund is a demand or obligation due from Moses Taylor & Co., to the estate of which the relator is the executor, and as such is intangible and does not require and is not susceptible of physical possession.

Assuming that to be so, the design of the testator in sending it here has not been changed. It was deposited for the purpose of investment and for no other purpose according to the record, there being nothing in the case to indicate that the testator had changed the purpose or object in view. So far as anything is disclosed on that subject, it appears that the relator, who was the executor of the depositor, came to this State from Cuba, for the purpose of obtaining the necessary legal status to enable him to get possession of the money, and with the intention, in order to carry out the provisions of the will of the depositor, of investing at least \$70,000 in bonds of the United States. And, under such circumstances, the observation of the court in *Williams v. The Board of Supervisors* (*supra*), and already quoted, is applicable, namely, "his capital cannot be taxed while awaiting investment."

There can be no doubt under all the facts and circumstances which control the question before us, that the fund of the taxation of which complaint is made, was sent here for investment, and left for investment and was taxed while awaiting investment, and upon the erroneous theory that the death of the depositor made a change in its status. There is nothing to indicate that; on the contrary, the evidence discloses that the intention of the testator was expressed, even in his will, of investing a certain portion at least of the fund in United States securities.

Under these circumstances we entertain no doubt that the fund was within the provisions of the statutes referred to; that the tax was illegal, and that the order appealed from should be reversed and the assessment directed to be canceled. No costs, however, will be allowed to the appellant.

DAVIS P. J. and DANIELS J., concurred.

Order reversed and assessment canceled, without costs.

the preparation of Part II.

MARY G. JONES, RESPONDENT, v. MORGAN JONES AND  
ANN JONES, HIS WIFE, APPELLANTS.

*What proof of the publication of a will will justify the submission of the question to the jury — no formal statement is necessary.*

Mr. Finigan, having been informed by one Sheridan that Mr. John Jones wished to have him draw his will, called upon Jones and it was agreed that the will should be drawn and executed at seven o'clock in the evening of that day, at which time the witnesses were to be present. On that evening Finigan, Jones, Furlong and Sheridan met, and the will was then drawn from instructions given by Jones and in his presence, and read to him by Finigan. He said it was correct, but would rather have Sheridan read it over to him, which Sheridan then did carefully and slowly. Jones then signed the will, and Finigan said "I will sign it as a witness, and then Mr. Sheridan," to which he answered, "All right;" and when Farley signed it he said, "Put your residence there; don't forget that."

*Held*, in an action of ejectment involving the validity of the defendants' title, acquired under such will, that the court erred in refusing to admit the will in evidence, upon the ground that there was not sufficient evidence of its due execution; that the question as to its due execution should have been submitted to the jury.

APPEAL from an order denying a motion for a new trial, made on the minutes, and a motion for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict rendered in favor of the plaintiff.

*Jacob F. Miller*, for the appellants.

*John E. Parsons* and *D. B. Ogden*, for the respondent.

BRADY, J.:

The plaintiff sought in this action to obtain possession of one-ninth of the property described in the complaint, her claim resting upon the allegation that she was one of the heirs-at-law of John Jones, who died seized of the premises.

The defendant Morgan Jones averred his ownership of the estate under and by virtue of three deeds duly executed and acknowledged by his brother, John Jones, and by which it was conveyed to him. The plaintiff assailed the vitality of these instruments, by evidence tending to establish their invalidity, by reason of the mental inca-

capacity of the grantor when they were made. The defendant Morgan Jones essayed to establish his title to the premises also by the will of his brother, which was offered in evidence, but rejected on the ground that there was "not sufficient evidence of due execution." The jury having the issue as to mental capacity then before them, only as to the deeds, found for the plaintiff generally. The defendants moved for a new trial on the minutes and the exceptions taken by them, which motion was denied, and the exceptions, by the order entered upon the decision of that motion, were ordered to be heard in the first instance at the General Term.

The learned justice, in declaring the result of his deliberation, said that it was a matter of great doubt whether there was sufficient evidence on the part of the plaintiff to go to the jury, but that as there were one or two pieces of evidence properly presentable to them the verdict might not be disturbed and he, therefore, ordered the exceptions to be heard as stated. Nothing was said upon the value of the exceptions, or any one of them, the learned justice having mainly, it would seem, considered the motion in relation to the weight of evidence. The will was an important element in the defendant's case for the reason not only that it gave the defendant Morgan Jones the property in controversy, but in effect confirmed the previous transfers which the plaintiff sought to destroy, and if it were improperly treated as a part of the defendant's case a new trial must follow.

A careful examination of the evidence bearing upon its execution and publication results in the conviction that the question at issue on that subject should at least have been submitted to the jury. It was drawn by Mr. Finigan, a lawyer. He was advised that John Jones wished his will drawn, and he went to see him. At that interview, which took place in the afternoon, it was agreed that the will should be drawn and executed in the evening, and they were to meet at seven o'clock with the witnesses necessary for that purpose. Mr. Jones suggested Mr. Furlong, who was then present, as one of them. In the evening Messrs. Finigan, Furlong, Sheridan and Jones met as contemplated. The will was then drawn from the instructions given by Jones, and in his presence, and read to him by Mr. Finigan. He said it was correct, but would rather have Mr. Sheridan read it over to him, which Mr. Sheridan then

FIRST DEPARTMENT, OCTOBER TERM, 1886.

did, carefully and slowly; Mr. Sheridan, it must be borne in mind, also, was the person who went to Mr. Finigan, at the request of Mr. Jones, to get him to draw the will. He then signed it, and Mr. Finigan said to him: "I will sign it as a witness, and then Mr. Sheridan," to which he responded: "All right;" and when Mr. Furlong signed it he said: "Put your residence down there; don't forget that." The meeting arranged for the evening was in reference to the presence of the necessary witnesses chiefly, it would seem; and the evidence is not disputable as showing, or at least tending to show, that they knew not only what the paper was, but that they assembled to witness its execution, and that it was declared by the testator to be all right, he suggesting as a part of the necessary formula, to Furlong, that his residence should be added. No other conclusion can be reasonably entertained from these facts and circumstances than that the testator sufficiently declared the will to be his, and requested the witnesses to attest it. Two of them, Sheridan and Finigan, by instructions from him, knew what was to be done in the evening, namely, his will drawn; and it was so drawn, in the presence of these witnesses, read twice to the testator, declared to be all right, and then signed by him and the witnesses. The attestation clause was full and complete.

In *Woolley v. Woolley et al.* (95 N. Y., 231), cited on behalf of the plaintiff, witnesses did not see the testatrix sign the paper, did not know it was a codicil and there was no acknowledgment of it as such. It was signed as a paper purporting something the witnesses knew not what, and it was expressly said, as one of the reasons controlling the judgment pronounced, that there was no proof that the testatrix acknowledged her signature to the witnesses, and that there was nothing from which it could be properly inferred that she did so. Here, as will have been perceived, the will was signed in the presence of witnesses, who knew what it was, after it had been read over twice to the testator, once by each of two witnesses, and declared by him to be all right.

In *the Matter of the Will of Cottrell* (95 N. Y., 335), many of the cases bearing upon this subject were considered, and it was said that the precise force which should be accorded a full attestation clause regularly authenticated, was not clearly defined in the cases, but that they all agreed in the conclusion that it was entitled to

great weight in the determination of the question of fact involved. And further, that such a clause duly signed and corroborated by circumstances surrounding the execution, has been held sufficient to establish a will signed by the testator, even against the positive evidence of the attesting witnesses to the contrary. Indeed it had been previously held that a will duly attested upon its face, the signatures to which were genuine, might be admitted to probate, although none of the subscribing witnesses were able to swear, from recollection, that the formalities of the statute were complied with, and even although some of them should swear positively that they were not, if the other evidence warranted the inference that they were. (*Orser v. Orser*, 24 N. Y., 52.)

In *Mitchell v. Mitchell* (16 Hun, 97, and affirmed in 77 N. Y., 596), to which reference is made in *Woolley v. Woolley* (*supra*), the deceased produced a paper and said: "This is my will, and I want you to sign it," and the witness complied with the request; whereupon he took it, after saying, "I declare this to be my last will and testament," delivered it to one of the witnesses for safe keeping; but there was no acknowledgement that what purported to be his signature was in fact made by him, which was held to be necessary, and was quite distinct from his declaration of the nature of the instrument. It differs, therefore, from the case in hand, for the testator signed his will in the presence of the witnesses. (*Willis v. Mott*, 36 N. Y., 486.) The decision of this court in the *Matter of Beckett* (35 Hun, 447) seems, however, to be controlling in favor of the defendants. It was there said that no formal declaration of the paper, executed as the last will and testament, was necessary; no form of words was essential. It was only required that the witnesses should be given to understand, by words or acts of the decedent, that the proposed paper was intended as a will. And that case, in its facts, is no stronger on the subject than this.

The doctrine of *Remsen v. Brinkerhoff* (26 Wend., 325, 332), approved in *Gilbert v. Knox* (52 N. Y., 125), was referred to, in which the chief justice said: "I agree that no form of words will be necessary; that the legislature only meant there should be some communication to the witnesses indicating that the testator intended to give effect to the paper as his will."



It is not deemed necessary to pursue this subject further. It is quite apparent; for reasons already assigned, that the question as to due execution, if any doubt were created, should have been submitted to the jury, and it was error, therefore, to exclude it.

For these reasons the judgment must be reversed and a new trial ordered, with costs to the defendants to abide the event.

DANIELS, P. J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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CHARLES Z. POND, AS EXECUTOR FOR SUSAN J. CLARK,  
DECEASED, RESPONDENT v. THE METROPOLITAN ELE-  
VATED RAILWAY COMPANY AND THE MANHATTAN  
RAILWAY COMPANY, APPELLANTS.

*Easement of light from a street — right of an abutting owner to recover damages for an interference with it — when one erecting and leasing an elevated road is liable for damages occasioned by the running of trains by the lessee of the road.*

This action was brought to recover damages for injuries occasioned to a four-story brick building belonging to the plaintiff, situated on the corner of McDougal and West Third street, in the city of New York, by the construction of an elevated road in West Third street by the defendant, the Metropolitan Elevated Railway Company, and by the operation of the same by the defendant, the Manhattan Railway Company, to whom it was leased in 1879.

*Held*, that although the plaintiff did not own the fee of the street he had an easement of light therefrom, which entitled him to maintain an action to recover the damages occasioned by any interference with, or interruption of the passage of the light from the street to his property.

*Story v. New York Elevated Railroad Company* (90 N. Y., 123) followed.

That in determining the amount of the damages the operation of the road as an entirety must be considered, and that as the running of the trains constitutes an essential part of the operation of the road any interruption of light thereby occasioned was to be considered as arising from the structure and its uses, and as forming a part of the disturbing cause.

That the fact that the defendant, the Metropolitan Railway, did not, after May 20, 1879, use the structure which it had leased to the defendant, the Manhattan Railway Company, did not prevent a judgment from being given against both defendants, as the first company, erecting the structure, by leasing it, when equipped for use, to the other defendant, continued the wrong complained of.

JOINT appeal by both defendants, from a judgment entered in favor of the plaintiff upon the findings and opinion of Mr. Justice BARRETT, after a trial had at the New York circuit without a jury.

This action was brought to recover damages to the property of the plaintiff's testatrix, alleged to have been occasioned by the acts of the defendants.

Susan J. Clark, the plaintiff's testatrix, owned the premises No. 136 MacDougal street, a four-story brick dwelling-house, fronting twenty feet on MacDougal, and with its whole length, fifty-eight feet, lying along West Third (more commonly called Amity) street. This street was laid out in 1823, pursuant to the general street opening act of 1813, and plaintiff's predecessor in title, Ireland, paid an assessment for such opening. In front of these premises on West Third street the defendant, the Metropolitan Elevated Railway Company, in 1876, built the present structure, and in 1878 commenced running trains thereon past the windows of this house, and in 1879 leased its property to the Manhattan Railway Company, which was operating it at the time this action was begun by Mrs. Clark in November, 1883. This structure stands on a level with the second story windows, and about twelve feet from them, and cuts off sunlight from the basement, parlor, and to a certain degree second-floor windows. The trains of cars, which stand about ten feet higher than the structure, cut off or interfere with all the light entering from the Amity street side, the basement, parlor and second-floor windows. They throw a flickering flashing light into these windows.

It was shown that the structure and its operations by the defendants interfered very materially with the easement of light and injured the value of the premises. Upon the trial the plaintiff abandoned his claim for damages to the easements of air and access, and rested his claim for compensation solely upon the damages to the easement of light as caused by the structure and operations of the railway. Judge BARRETT assessed the damages at \$2,500, and directed judgment for that sum and costs.

*Edward S. Rapallo*, for the appellants.

*Inglis Stuart*, for the respondent.

BRADY, J.:

The Court of Appeals in *Story v. New York Elevated Railroad Company* (90 N. Y. 122), as it is understood, determined that an abutting owner, for an injurious interference with, or interruption of light from the street, was entitled to remuneration. It was an easement to the unobstructed enjoyment of which he was entitled. There are many cases cited in the prevailing opinion delivered in that case by Justice DANFORTH, illustrative and declarative of the rule.

The substantial objection urged with great zeal by the learned counsel for the defendants, is that the Legislature having the power, duly authorized the construction of the defendant's road, and the abutting owner, who does not own the fee of the street, cannot claim any compensation for any inconvenience resulting from the exercise of the right conferred, if the street still remains open and practicable for the ordinary use of the public. But this proposition expressive though it may be in cases to which it is properly applicable, seemed to be formulated upon the dissenting opinion of EARL, J. in the *Story* case, although sustained by other citations. Whatever may have been or may be the rule as to surface roads *per se*, that which governs the rights of the abutting owner from structures above the surface has been defined for this case by the adjudication to which reference has been made.

The issue, therefore, which was presented herein to the learned justice presiding at the trial was, whether the defendant's structure and its use invaded the realm of light which, in common with others belonged to the plaintiff, and diminished it. Upon that subject the evidence may be said to have been in collision, if not in conflict, and, after due deliberation, to have been regarded as more favorable to the plaintiff. This applies as well to the issue mentioned as to the amount of damages which should be awarded to the plaintiff for the deprivation to which he was subjected; and as the evidence must be said to be sufficient to sustain both conclusions arrived at, the judgment cannot, on the questions of fact, be disturbed. The rule of damages adopted, namely, the difference in value with the full and unobstructed use of the easement and the value without it, was the proper one. (*Matter of N. Y. C., etc., Co.*, 15 Hun, 63, 67, 69; *Matter of Lackawanna and W. R. R. Co.*, 29 id., 1; *N. Y., W. S. and B. Ry. Co. v. Sutherland*, 35 id., 280.)

These cases also establish the proposition that the operation of a road as an entirety must be considered in the estimate of damage and, therefore, the running of trains constitutes an essential part of it — indeed the most important — for without them it would be useless. Whatever interruption of light, therefore, they occasioned was a part of the interference arising from the structure and its uses and legitimately a part of the disturbing cause. (See, also, Story's case *supra*.) The evidence relating to them was properly received therefore.

The further proposition that judgment could not be given against both defendants for the reason that the structure was not used by the defendant, the Metropolitan Railway, after May 20, 1879, when it was leased to the defendant, the Manhattan Railway, is not regarded as sound. The first defendant named erected the structure and equipped it for use and subsequently leased it to the second defendant named, and thus continued the wrong complained of.

This case has been frequently examined, and although the extended, exhaustive and able brief of the appellant's counsel presents a fine field of refinements and invokes discussion, it is nevertheless simple, starting with the proposition that the obstruction of light may not be indulged in without affording proper indemnity. No error in its disposition has been discovered and the judgment must be affirmed with costs.

DANIELS, J., concurred.

Judgment affirmed, with costs.

HENRY L. PIERSON AND OTHERS, APPELLANTS AND RESPONDENTS, v. ROBERT CROOKS, AND OTHERS, APPELLANTS AND RESPONDENTS.

*Contract for a sale of iron—right of the purchaser to reject such as is not of the quality specified—when the examination is not required to be made at the place of shipment—when the purchaser may accept part and reject the remainder of the iron delivered—when he may reject iron not loaded on the vessel at the port specified in the contract.*

This action was brought by the plaintiffs to recover back moneys paid by them for freight, duties and other charges on iron which the defendants, merchants in the city of Liverpool, had by a written agreement, signed by their brokers in the city of New York, agreed to sell and deliver to the plaintiffs. The agreement, which was dated in New York, stated that the defendants had sold to the plaintiffs 100 tons W. I. W., or equal hoop iron, at £10 per ton; 100 tons W. I. W., or equal sheet iron, at £11.15.0; fifty tons R. G., or equal sheet iron, at £16.5.0, "all free on board Liverpool, payment by 60d St. Bl. Exchange, against shipping documents here, less two and one-half per cent." It was understood that the defendants, who were not manufacturers of iron, should obtain it from other persons and ship it to the plaintiffs. The plaintiffs accepted all the iron agreed to be sold except the hoop iron and the final shipment of the R. G. sheet iron, which they refused to accept, upon the ground that the iron was very much inferior in quality to that which they were, by the terms of the agreement, entitled to receive. After the hoop iron upon one vessel had been unloaded and weighed by the officers of the custom house, and removed to the plaintiffs' place of business, it was rejected by them, of which notice was given to the defendants.

*Held*, that the plaintiffs were justified in rejecting it at that time, and were entitled to recover from the defendants what they had paid for freight, duties and other charges or advances upon the iron.

That a claim made by the defendants that the right to examine and reject, or accept, must be exercised before the iron was received and shipped at the city of Liverpool, and could not be exercised after its arrival in the city of New York, was not well founded.

*Allard v. Greasert* (61 N. Y., 1); *Mee v. McNider* (39 Hun, 845), and *Pope v. Als* (15 U. S., 368) followed; *Neaffle v. Hart* (4 Lans., 4); *Pease v. Copp* (67 Barb., 132); *Stafford v. Pooler* (Id., 148) distinguished.

After the arrival in the city of New York of one of the vessels upon which the hoop iron was loaded, and before the other vessel had left the city of Liverpool, and before it had been loaded with all the iron to be shipped upon it, the plaintiffs notified the defendants that they would not receive any more iron of the quality shipped on the first vessel.

*Held*, that as it was shown that the iron loaded on the second vessel was of the

same quality as that loaded on the first, the plaintiffs were entitled to reject it without inspecting or examining it.

*Pope v. Porter* (102 N. Y. 366) followed.

Some of the hoop iron was shipped upon vessels upon which were also shipped portions of the sheet iron. The sheet iron was accepted and received by the plaintiffs, while the hoop iron was rejected.

*Held*, that the contract being for the sale of different qualities of iron at different prices it was not to be considered as an entire contract, but as a severable one, and that the plaintiffs were entitled to receive that distinct part of the property which complied with the terms of the agreement, and to reject that portion thereof which failed to comply therewith.

*Young v. Wakefield* (121 Mass., 91); *Merrill v. Agricultural Insurance Company* (73 N. Y., 452); *Swift v. Opdyke* (43 Barb., 274) followed.

That payments made by the plaintiffs towards the purchase-price of the iron did not operate as a waiver of their right to object to the quality of the iron, as such payments were made, as required by the agreement, upon the production of the shipping documents, and upon the supposition that the contract had been, or would be, so performed as to entitle the defendants to the money.

A portion of the R. G. sheet iron was not laden on the vessel by which it was shipped at Liverpool, but was laden at Cardiff, a port in Wales on the British channel.

*Held*, that the plaintiffs were entitled to refuse to accept it as the defendants had, by the agreement, agreed to ship the iron at Liverpool.

*Filley v. Pope* (115 U. S., 218) followed.

That the performance of this condition of the agreement was not waived by the plaintiffs, by receiving and paying for other iron so shipped, as the payment was made without information on the part of the plaintiffs that such other iron had not been shipped at Liverpool.

APPEAL from a judgment entered on the report of a referee.

*George A. Black and James C. Carter*, for the plaintiffs.

*John L. Hill*, for the defendants.

DANIELS, J. :

The action was brought by the plaintiffs to recover back moneys paid by them for freight, duties and other charges, on iron which the defendants contracted to sell and deliver to them. The contract was made through the agency of brokers representing the defendants, who were merchants in the city of Liverpool. The contract is as follows :

“NEW YORK, February 11, 1880.

“Sold to Messrs. Pierson & Co., New York, for account of Messrs. Robert Crooks & Co, Liverpool :

"One hundred (100) tons W. I. W., or equal hoop iron, at £10 per ton.

"One hundred (100) tons W. I. W., or equal sheet iron, at £11,15,0.

"Fifty (50) tons R. G., or equal sheet iron, at £16,5,0, all free on board Liverpool, payment by 60d st. Bl. exchange against shipping documents here, less two and one-half per cent. Immediate specification.

"WHITE & DRUMMOND,

*"Brokers."*

"Accepted.

"PIERSON & Co."

And the 100 tons of hoop iron mentioned in it were afterwards increased to 150 tons. Specifications were supplied by the plaintiffs for the shipments and delivery of the iron in three or four different parcels. The defendants were not manufacturers of the iron, but it was designed that they should, as they afterwards did, obtain that from the manufacturers which they afterwards shipped to the plaintiffs. The 100 tons of sheet iron proved to be satisfactory and acceptable and was received and paid for by the plaintiffs. And so was a certain portion of what is called the R. G. sheet-iron, subject to certain allowances and deductions which were made. The controversy in the action has, in this manner, been limited to the hoop iron and the final shipment of the R. G. sheet iron amounting to nearly forty-one tons. As to all the hoop iron, and this residue of the R. G. sheet iron, the plaintiffs objected to receiving it upon its arrival in New York where the hoop iron was unladen, and in Brooklyn where the R. G. sheet iron was unladen. The objection taken to the acceptance of the hoop iron was that it was very much inferior in quality to that which the plaintiffs were, by the terms of the agreement, entitled to receive. Two of the shipments which were made of the hoop iron were also accompanied with shipments of sheet iron. These were made upon the steamers Germanic and Arizona. Other shipments of hoop iron were made by the steamers City of Chester and Abyssinia. Upon these two steamers were laden no portion of either quality of sheet iron, and upon the arrival of the City of Chester and the unloading of the iron, the

plaintiffs, upon an examination of its quality and condition, rejected it as not in compliance with the agreement they had made with the defendants. And the referee, by his decision, concluded that the plaintiffs were justified in the objections made to this iron, and also that laden on the *Abyssinia*, leading them to reject it. And for that reason they have been permitted by the judgment to recover against the defendants what they paid for freight duties and other charges, or advances, upon this iron. It appeared, by the evidence, that they were not permitted to handle or remove the iron until it had been weighed by the officers of the custom house, and that after delaying until that was done the portion of the iron coming by the *Germanic* was taken to the plaintiff's place of business where an examination was made of it resulting in their determination to reject it, of which notice was given to the defendants. The other was examined upon the wharf, and, being found of the same quality, that also was rejected. That the evidence justified the referee in concluding this iron to be of an inferior quality to that mentioned in the contract of sale, is conceded by the case, and that relieves it from the necessity of any examination of this fact which was disputed before the referee upon the trial.

There appears to be nothing unreasonable in the delay which took place at the city of New York in the examination of the iron after its arrival. It was not done as speedily as that might be done, but, as the circumstances were made to appear, there was no unreasonable delay on the part of the plaintiffs in subjecting the iron to these examinations. And as the law has required no more than reasonable diligence in the examination of property shipped, or offered, to the purchaser after its arrival, its requirement was observed by the plaintiffs in this instance. They were not required to dispense with the other demands of their business and devote immediate attention to this iron, but it was their duty to proceed reasonably as they would be expected to do with other urgent matters of business. And that duty does not seem to have been neglected as the facts of this case have been disclosed.

It is insisted, however, on behalf of the defendants, that this right to examine the iron and reject, or accept it, as it was found not to conform with the contract, could not be made after it was received and shipped at the city of Liverpool; that the agreement designated



that to be the place for its delivery, and imposed the duty upon the plaintiffs of making their examination of it at that port. But that is not the construction which should be given to the agreement. It neither provided for nor contemplated an inspection, or examination of the iron at that port, but what was to be there done was for the defendants to deliver the quality of iron mentioned and described in the agreement free on board at that place. This was the obligation they undertook by the contract that was entered into. It was to deliver on board the ships at Liverpool this and no other quality of iron. And no intimation was given, or expectation indicated that the plaintiffs, who were merchants, doing business in the city of New York, should present themselves at Liverpool, either personally or by an agent, to discover whether the defendants performed this obligation or not. No intervention on their part was provided for, but the part of the contract to be there performed was wholly cast upon the defendants themselves, and if they failed to perform it the plaintiffs had the right, upon the discovery of that fact, to reject so much of the iron as failed to comply with the terms of the contract. A point similar to this was considered in *Allard v. Greasert* (61 N. Y. 1), where the controversy arose under the statute of frauds. And while this statute is not brought in question in this case, what was there said concerning the obligation of the vendee to examine the property at the place of shipment for the purpose of ascertaining whether it complied with the requirements of the contract is applicable to this controversy. But if not, because of this distinguishable circumstance, still, as it was manifestly the intention of the parties from the agreement that what was to be done at Liverpool was to consist wholly of the acts of the defendants, the vendees were not obliged to present themselves there either in person, or by agent, to see whether they performed, as they agreed to do, that, or not. This point, under a somewhat similar contract, was considered in *Mee v. McNider* (39 Hun, 345), where it was held that the contract of sale obligated the vendor to deliver the property agreed to be sold in the condition required by the agreement, on shipboard at the place of shipment. And if he did that, his agreement was performed, and he thereby placed the property at the risk of the vendee, while if he failed to do so he failed to perform his contract. This point was also considered, and a like conclusion reached in

*Pope v. Allis* (115 U. S., 363). And the authorities very clearly distinguish this case from those relied upon in support of this position by the defendants. For in *Neaffie v. Hart* (4 Lansing, 4), the defective boiler was not only received, but knowing its defects, it was retained and used as a boiler by the vendee. And so was the cheese which was the property sold in *Pease v. Copp* (67 Barb., 132). While in *Stafford v. Pooler* (Id., 143), the contract made the delivery of the hoops personal to the defendant. These cases are, consequently, inapplicable to the controversy and do not conflict in the principle they follow with that maintained by the other authorities. Those authorities proceed upon the obligation of the vendor in an agreement of this character to ship the property of the quality and in the condition described in the agreement, reserving, upon its arrival at the port of destination, to the vendor the right to examine and reject it if that obligation appears not to have been performed.

This right of inspection and examination preceding the obligation to accept the property is maintained by all the authorities where the sale is executory, and the property itself is unascertained or separated, as were the facts in this case. This was the conclusion of the court in *Sprague v. Blake* (20 Wend., 61), where it was said that "when the party comes under such a contract, to deliver an inferior unmerchantable commodity, which lies open to inspection, then is the time for the vendee to take his ground. He must then refuse acceptance, or at least so soon as he discovers what the quality of the article is, and offer to return it." (Id., 64.) And as much as this was held in *Reed v. Randall* (29 N. Y., 358), for there it was stated in the prevailing opinion that the vendee "is not bound to receive and pay for a thing that he has not agreed to purchase; but if the thing purchased is found, on examination, to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back and thereby rescind the contract, or he will be presumed to have acquiesced in its quality. He cannot accept the delivery of the property under the contract, retain it after an opportunity of ascertaining its quality, and recover damages if it be not of the quality or description called for by such contract." (Id., 363.) And *Gurney v. Atlantic, etc., Railway Company* (58 N. Y., 358) proceeds upon the same principle. There

it was stated that "the general rule is when articles are sold upon an executory contract \* \* \* that the delivery and acceptance of the articles, after examination, or an opportunity to examine them, is a consent or agreement that the articles correspond with the contract and precludes a recovery for any defects which may exist." (Id., 364.) And the plaintiffs fully complied with this rule in their examination of the iron, their refusal to receive it, and their notice of that refusal to the defendants. This examination was made when the opportunity first presented itself for observing and testing the make and quality of the iron. It was not required that this should be done before the arrival of the iron at its port of destination by anything contained in, or to be implied from, the agreement, and the right to subject it to the examination which was made was, under the authorities referred to, for the first time legally presented upon the arrival of the iron in the city of New York.

In the case of *Pope v. Allis* the examination and inspection of the property was deferred to a much longer and more remote point of time, and still it was sustained by the court and the vendee was relieved from the obligation to receive and accept the property under the agreement. As to these two shipments, by the City of Chester and Abyssinia, therefore, the plaintiffs clearly maintained their right to recover the amounts awarded to them by the referee in his report, for, while the iron on the Abyssinia was not actually inspected or examined by the defendants, the evidence in the case justifies the conclusion that it was of the same quality as that delivered from the City of Chester. It was not contended to be otherwise by the defendants, and the plaintiffs, assuming from the three preceding shipments that the hoop iron was all of the same quality, notified the defendants of their refusal to receive any more of that quality of iron; and this was communicated to the defendants before the iron by the Abyssinia was entirely laden or the ship had left the city of Liverpool. In this refusal they certainly seem to have been justified by the principle proceeded upon in *Pope v. Porter* (102 N. Y., 366), for, as the defendants had shipped to them only this inferior quality of iron, the facts supported them in the conclusion that no better quality could be expected to be received under the agreement.

As to the hoops shipped by the steamers Germanic and Arizona,

a further objection to the right of the plaintiffs to recover arises out of the fact that upon these steamers there were also shipped certain qualities of the sheet iron, the Germanic having on board upwards of fifteen tons, and the Arizona upwards of forty seven tons of the sheet iron. This iron was accepted and received by the plaintiffs, but the hoop iron arriving with it was rejected, and the objection has been taken that the plaintiffs could not accept one portion of these shipments and reject the other. But by the agreement these were two distinct and separate qualities of iron which the defendants agreed to sell, and deliver for different prices. For the hoop iron they were to be paid ten pounds per ton, and for the sheet iron they were to be paid eleven pounds, fifteen shillings per ton. These sales were accordingly of two separate and distinct subjects, for distinct prices pertaining and applicable to each of them. And when that is the case the contract of sale has not been considered to be entire but severable in its nature, allowing the purchaser to receive that distinct part of the property complying with the terms of the agreement, and to reject the other distinct part which fails to be of the description of the property agreed to be sold. This point was considered in *Young, etc. v. Wakefield* (121 Mass., 91), where it was held that different articles, bought at the same time, for distinct prices, might be accepted so far as they conformed to the agreement of sale, and rejected where that proved not to be the fact. (Id. 93.) This was also held to be the law in *Merrill v. Agricultural Insurance Company* (73 N. Y., 452), and the same principle is applied in *Swift v. Opdyke* (43 Barb., 274), and it is in no degree inconsistent with the case of *Secor v. Sturges* (16 N. Y., 548).

This principle, applied in this manner, is entirely in accordance with the general legal rule that where an agreement is to be rescinded it must be rescinded wholly, or not at all, for the plaintiffs did not undertake to rescind the agreement relating to the shipments of hoop iron, except in the single instance of that which finally came by the Abyssinia. What they did was to refuse to receive the inferior quality of hoop iron shipped to them by the defendants for the purpose of performing their agreement. That did not rescind the contract or any part of it. It was still left, as a subsisting agreement between these parties, which the defendants might have fulfilled by supplying the plaintiffs with the proper quality of

hoop iron. If they had done that then the plaintiffs would have been liable for whatever damages might have been sustained by refusing to receive the iron. And as they failed to do that the plaintiffs were at liberty to claim indemnity under the contract for what they had paid upon the iron, or for any loss they might have sustained in consequence of a favorable change in its market price. These rights legally grew out of the contract itself and entirely distinguish the case from those where a rescission of an agreement has been attempted. There the law requires that it shall be wholly rescinded to make the act of the party effectual for the purpose of recovering back that which he may have parted with under the agreement. This is not that case, but it is a case where the defendants agreed to deliver a special quality of hoop iron and failed to do so. By that failure they omitted to perform their agreement, and all that the plaintiffs did was to refuse to receive the inferior iron when they discovered this failure on the part of the defendants. It was not a rescission of the agreement in any respect whatever, but no more than a refusal to receive what they were not bound to accept as a part performance of it. And they were accordingly entitled to recover upon the view which the referee was supported in adopting concerning the facts of this part of the controversy.

The payments which were made by the plaintiffs towards the purchase-price of the iron did not have the effect of waiving their right to insist upon it that the quality should be the same as that mentioned in the agreement, for the first payment does not seem to have included any part of the hoop iron on the Germanic, which had then been discovered to be defective in quality, and it was made, as the agreement declared it should be, by a bill of exchange against the shipping documents produced and delivered to the plaintiffs, which it was essential they should possess in order to be able to obtain any control of the iron. This payment, including the invoice by the Arizona, as well as the succeeding payment, were made on account, and on the supposition that the contract had been, or would be, so performed as to entitle the defendants to the money. It was not a voluntary payment, in the sense excluding their right to recover so much of it back, as would protect the defendants against the obligation to restore so much of the money,

as the plaintiffs' indemnity required to be restored, by the failure to perform the agreement which they entered into. Neither these payments nor any other facts appearing in the case deprive the plaintiffs of their right to recover, so far as it has been sustained by the conclusions of the referee.

It has, however, by the judgment been determined that the plaintiffs were not justified in refusing to accept so much of the R. G. sheet iron as arrived by the steamer Rrhubina. This iron was not laden on the steamer at Liverpool, but it was put on board of her at Cardiff, a port in Wales, on the Bristol channel. And because of its shipment in this manner, as well as objections taken to a slight excess in quantity, the plaintiffs refused to receive it. And the first of these objections certainly appears to have been warranted by the agreement, for the defendants agreed to ship the iron at Liverpool. They were not to insure it, but that was to be done, according to the specifications, by the plaintiffs, and, as they were not aware of this change in this port of shipment, the insurance effected by them upon it, if they did insure it, would have been worthless, if the iron had been injured or lost by a peril of the sea. This variation from the port of shipment would render the insurance invalid, and it did not create even a qualified delivery of the iron to the defendants, subject to their right of examination, under the rule sustained in *Wilcox Silver Plate Company v. Green* (72 N. Y., 17). For, to constitute even a qualified delivery of this description, the defendants were bound to ship the property as that had been provided for in their agreement, and having failed to do that, and no acceptance of the iron being made by the plaintiffs after its arrival, there was not even a qualified delivery of the iron shipped in this manner.

As to this iron the defendants failed to perform what the parties had agreed upon as one of the precedent attributes of their contract. And the performance of that condition was not waived by receiving and paying for the iron shipped at the same port on the Rhiwinda, as that payment was made without information on the part of the plaintiffs that the iron had not been shipped at Liverpool, and the defendants accordingly had no legal right to claim that this iron should be received by the plaintiffs. A point of this description was considered in *Filley v. Pope* (115 U. S.,

FIRST DEPARTMENT, OCTOBER TERM, 1886.

213), where it was held that such a departure in the port of shipment relieved the vendee from accepting or receiving the property so shipped. The referee accordingly erred in the conclusion arrived at by him, that the plaintiffs were legally liable to accept this iron, and not having done so, were chargeable with the difference between the price they agreed to pay for it and the net proceeds of the sale which was afterwards made of it. This part of the judgment, therefore, requires to be reversed, and the amount deducted on account of it from the demands sustained by the proof in the plaintiffs' favor should be restored. And as there is not the slightest ground for supposing or suggesting that the defendants will be able to make any case upon which the plaintiffs would be legally chargeable for this difference, a further trial of this part of the action will not be necessary.

This part of the judgment should, accordingly, be reversed, and the counter-claim of the defendants, including it, dismissed, unless a further trial of this part of the action shall be made to appear to be desirable on the settlement of the terms of the decision, and the plaintiffs should have judgment for the amount found to be otherwise due and owing to them by the referee and included in the judgment, and as so modified the judgment should be affirmed.

DAVIS, P. J., and BRADY, J., concurred.

Judgment modified as directed in opinion, and as modified affirmed.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
SIGMUND NEUSTADT, AS EXECUTOR AND TRUSTER, ETC.,  
OF ADOLPH HALLGARTEN, DECEASED, v. MICHAEL  
COLEMAN AND OTHERS, COMMISSIONERS OF TAXES ETC., OF THE  
CITY OF NEW YORK.

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*Assessment for personal property — when all the estate may be assessed against one of several executors — power of the commissioners of taxes in New York city to correct erroneous assessments — 1882, chap. 410, sec. 820 — power of the court to do so on the hearing of a certiorari to review them — Code of Civil Procedure, sec. 2141.*

Upon the hearing of an application to correct an assessment of \$375,000 for personal property, made by the commissioners of taxes of the city of New

FIRST DEPARTMENT, OCTOBER TERM, 1886.

York against the relator, John Duer and Julia Hallgarten, as executors of the estate of Adolph Hallgarten, it was shown that the relator resided in the city of New York; that John Duer resided in the county of Richmond, and that Julia Hallgarten resided in Germany; that part of the property of the estate consisted of railroad bonds, registered in the names of all three executors, and of bonds and mortgages taken in their names, and of bonds registered in the name of the deceased, all of which were deposited in a safe deposit vault, in a box or safe, rented by said deceased during his lifetime and still standing in his name, though the rent had, since his death, been paid by his executors. The commissioners corrected the roll by striking out the names of the two executors not residing in the city of New York, leaving an assessment for the full amount as against the relator.

*Held*, that the property was in the possession of the relator, or under his control as executor or trustee, within the meaning of section 5 of 1 Revised Statutes (6th ed.), 934, and that an assessment for the full value thereof was properly imposed upon him.

That, under the power conferred upon the commissioners by section 820 of chapter 410 of 1882, to cause an assessment which is, in their judgment, erroneous, to be corrected, and to fix the amount of such assessment as they believe to be just, they were authorized to strike out the names of the non-resident executors upon the hearing of the application.

That, if the commissioners had not made this correction, this court could have made it, under the power conferred by section 2141 of the Code of Civil Procedure upon the hearing of the *certiorari*.

WRIT of *certiorari* to review the legality of an assessment made against the relator for the personal estate of the testator, amounting to the sum of \$375,000.

*George A. Strong*, for the relator.

*George S. Coleman*, for the commissioners.

DANIELS, J.:

After the assessment was made by the commissioners, assessing the executors for personal property to the amount of \$375,000, an application was made in their behalf for the correction of the assessment. This was supported by the affidavit of two of the executors stating that John Duer, one of the three executors, resided in the county of Richmond, in this State, and Julia Hallgarten, another, resided in Hamburg, in Germany. It was not denied in either of the affidavits that the property itself, concerning which the assessment was made, was located in the city of New York; but for the reason that two of the



FIRST DEPARTMENT, OCTOBER TERM, 1886.

executors resided out of the city and county of New York, it was urged before the commissioners that no assessment on account of this property could be made by them. In support of the application it was stated in the affidavit of the relator that "part of said property consists of railroad bonds registered in the names of all three of the executors; another part consists of moneys which have been loaned upon bond and mortgage taken in the names of all three executors as trustees, and the remainder consists of bonds which were registered in the name of Adolph Hallgarten during his lifetime, and have never been changed. All of the above mentioned securities are kept in a safe deposit vault, in a box or safe, rented by said Adolph Hallgarten during his life time and still standing in his name, but the rent of which, since his death, has been paid by his executors." And because he was the only executor residing in the city of New York, the objection was taken that no assessment whatever could be made on account of this property, or, if it could be, that his one-third interest in it, as executor, amounting to the sum of \$125,000, should be the extreme limit of the assessment. The commissioners held adversely to these objections, and that the assessment could not be reduced in amount but that it should be corrected by striking out the names of the two executors not residing in the county of New York, and remain as an assessment for the full amount against the relator.

Authorities have been relied upon in support of the position that the commissioners could not change the assessment by striking out the names of the two non-resident executors and allowing it to stand against the relator alone, but these authorities are not controlling over the controversy. For, in the case of *Clark v. Norton* (49 N. Y., 243), the assessment was held to be illegal because of the addition of the name of a person as owner of the real estate, after the period for inserting that in the roll had expired. And upon a like want of authority the case of *Westfall v. Preston* (49 N. Y., 349) was decided; a similar want of authority was presented in *Overing v. Foote* (65 N. Y., 263.) And in *Stewart v. Chrysler* (100 N. Y., 378), the assessment itself was not made to the person against whom the law provided that should be. While in *People ex rel. Chamberlain v. Forrest* (96 N. Y., 544) the assessment

was increased from \$4,000 to \$40,000, after the time in which the power to make the increase could by law be exercised. In the present case the commissioners acted within the time allowed for that purpose by the statute, and their decision should be sustained if their action is not to be held to have been illegal in some other respect. The case of *Stinson v. Boston* (125 Mass., 348) is also inapplicable to this case for it was decided upon the effect of a statute of the State of Massachusetts excluding the power to assess the owners of shares of ships and vessels in the place where the other business of the partners was carried on, when they themselves resided elsewhere. And in *Mayor, etc., of Baltimore v. Stirling* (29 Md., 48), the law failed to indicate or direct how the two trustees, not residing in the place where the assessment was made, should be respectively assessed. In *Hardy v. Yarmouth* (6 Allen, 277) the decision also proceeded upon a statute of the State of Massachusetts providing for the assessment of the estate of the testator only in the town where he resided, until notice should be given of the names of the persons to whom it had been distributed, as parties in interest. While the case of *State v. Matthews*, cited as reported in 10 Ohio State, 436, has not been found because of the inaccuracy of the reference. Neither one of these authorities from the reports of other States arose under any such provision of law as the legislature of this State has prescribed for the assessment of personal property.

The law, as it has been here enacted, and was in force at the time when the assessment in controversy was made, has provided that "Every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him, including all personal estate in his possession, or under his control, as agent, trustee, guardian, executor, or administrator, and in no case shall property so held under either of these trusts be assessed against any other person." (1 R. S., 6th Ed., 934, Sec. 5.)

What this statute has directed is that the executor to be assessed, shall reside in the town or ward where the assessment is made, and shall be possessed of the personal estate forming the subject of the assessment. The relator has not denied that his residence subjected him to assessment under the direction contained in this statute and the laws specially applicable to the city of New York. Neither

does it appear that any part of the property for which he has been assessed was not in his possession. What he has denied is, that it was not in his possession or under his control "any more than it is in the possession and under the control of my co-executors, as will appear by the following facts," being those already extracted. It is to be assumed, therefore, as that seems to have been done on the hearing before the commissioners, that the personal estate was at the time in the city of New York, where this executor resided, and that the assessment could lawfully be made by them, provided the relator can be held to be a person having the control or possession, of this personal estate. And that he can be held to have had the possession or control within the significance of these terms, appears to follow from the title invested in him as an executor. For, if a man appoints several executors, they are deemed in law but as one person representing the testator, and, therefore, the acts done by one of them which relate either to the delivery, gift, sale, payment, possession or release of the testator's goods, are deemed the acts of all for they have a joint and entire authority. (*Murray v. Blachford*, 1 Wend., 583, 617; 4 Bacon Abr. [3d ed.], 1860, 37, 38.) And where there may be two or more executors, and one of them shall die, the survivors become vested with the title to the personal estate. And this is, upon the same principle already mentioned, that if there be several executors they are regarded in the law as one person. They have a joint and entire interest in the effects of the testator, including chattels real, and in case of death such interest vests in the survivor. (1 Williams on Exrs. [6th Am. ed.], 286; 2d Id., 980.) And this has been embodied in a statutory provision of this State. (3 R. S. [6th ed.], 83, § 59.) And for all practical purposes it vests in each of the executors a title similar to that vested in joint tenants. Each may discharge debts due to the estate by receiving payment (*People v. Keyser*, 28 N. Y., 226), or release real estate from the lien of an incumbrance. (*Stuyvesant v. Hall*, 2 Barb., Ch., 151.)

The title of a joint tenant has been declared to extend to the whole of the property jointly held, and his possession to be that of the entirety, as well of every parcel as of the whole (4 Kent's Com. [7th ed.], 375), and the relator was vested with this title and possession, over the personal estate of the testator, which the com-

missioners assessed ; for as to that he was a trustee for the next of kin holding it in trust for their benefit. (1 Perry on Trusts [2d ed.], 94 ; 2 Story's Eq. Jur., § 1208.) And he is designated a trustee in the section of the statute declaratory of the power of the commissioners over the assessment. And it is quite well settled that trustees are in equity regarded as joint tenants. (Id., § 343.) These principles, sanctioned as they are by the authorities, vested the relator with the title in trust to this property. And as it was in his possession, or under his control, and he himself was liable to assessment, as a resident of the city of New York, the commissioners were right in making the assessment of it to him, for, under the statute, it could be made to no other person. The executor Duer had not the possession of the personal estate where he resided, neither had the executrix Hallgarten ; and it follows, if the relator could not be assessed, then this property will escape taxation. When the proceedings were before them, as they were upon his application and also on the application of the executor Duer, and it was made to appear to the commissioners that the assessment should be against the relator alone, they were authorized to correct the assessment in that respect by striking out the names of the two other executors. For, by section 820 of chapter 410 of the Laws of 1882, very general authority has been given to the commissioners to correct their assessments. It has not been restricted to a mere reduction of the amount ; but if, in the judgment of the commissioners, "the assessment is erroneous, they shall cause the same to be corrected and fix the amount of such assessment as they believe to be just," etc. The authority delegated to them was to correct errors appearing to have intervened in the assessment, and as this assessment was shown to be erroneous, by including in it the names of the non-resident executors, those names were very properly stricken out of it. By making this change, neither the assessment itself nor the liability of the relator was in any manner increased. It was still for the same amount, and whether he himself shall be required to pay the tax, or it may be paid by him in conjunction with the other two executors, will make not the slightest difference to the estate. For whoever may pay it, it will either be paid out of the funds of the estate committed to the charge of the executors, or the executor paying it will reim-

burse himself out of those funds. If that correction had not been made by the assessors themselves, this court could have made the correction under section 2141 of the Code of Civil Procedure upon the hearing of the writ of *certiorari*, and that would have left the assessment, as the commissioners did leave it, by their final action, and the court certainly could do no more than the commissioners should themselves do to correct an error in their proceeding.

The assessment which was made was accordingly right, and it should be affirmed, with costs.

DAVIS, P. J., and BRADY, J. concurred.

Proceedings affirmed, with costs.

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JAMES B. CORBETT, APPELLANT, v. THE TWENTY-THIRD STREET RAILWAY COMPANY, RESPONDENT.

*Regulation of a horse railroad company as to the return of money deposited in a fare box by mistake — when unreasonable — right of a person depositing it to retain a fare received from another passenger — liability of the company for the act of its driver in causing the arrest of a passenger.*

The plaintiff, on entering one of the defendant's cars, which was operated by a driver without a conductor, put into the box, used for that purpose, five fares for himself and three companions. Upon discovering his mistake and applying to the driver for the restoration of the excessive fare placed in the box, the driver refused to restore it, alleging that he had no authority to return the fare or correct the mistake, and directed the plaintiff to repair to the office of the company for his money. During a wordy altercation between the plaintiff and the driver, a lady entered the car and delivered her five cents fare to the plaintiff who placed it in his pocket. The plaintiff having refused to deposit the fare in the box, the driver, after the lady had reached her destination and left the car, removed the plaintiff from the car and delivered him into the custody of a policeman, who confined him in a station-house until the following morning, when he was discharged by the court.

Upon an appeal from a judgment, entered upon an order dismissing the complaint made upon the trial of this action, brought to recover damages for an assault and false imprisonment:

*Held*, that a regulation of the company requiring a passenger, who may be deprived of his money by his own mistake in this manner, to go to the office of the company for its reimbursement, and the correction of the mistake is entirely unreasonable. (DAVIS, P. J., dissenting.)

That the plaintiff was clearly entitled to a restitution of the money deposited by him by mistake in the box, and that it was entirely reasonable for him to retain the fare received from the other passenger, and thus reimburse himself for the money inadvertently placed in the box. (DAVIS, P. J., dissenting.) That, as the driver removed the plaintiff from the car, and placed him in the custody of the officer, under the authority conferred upon him for the management of the car by the defendant, the latter became legally liable to the plaintiff for the damages to which he, in that manner, had been subjected. That this liability included the entire injury and indignity to which the plaintiff was subjected, not only by his removal from the car, but by his subsequent imprisonment and detention in the station-house.

APPEAL from a judgment dismissing the plaintiff's complaint on a trial at the New York circuit.

*Hermon H. Shook*, for the appellant.

*O. E. Bright*, for the respondent.

DANIELS, J. :

The cause of action set forth in the plaintiff's complaint was for his assault and false imprisonment, occasioned by his removal from one of the defendant's cars and his delivery by the driver into the custody of a policeman, and his detention in a station-house during the succeeding night. He was a passenger in the car, which was operated by the driver himself without a conductor. On entering the car he put into the box, used for that purpose, five fares, for himself and three companions. Upon the discovery of the mistake he applied to the driver for the restoration of the excessive fare placed in the box. This the driver refused, having no authority himself to return the fare or correct the mistake, and he directed the plaintiff to repair to the company's office for his money. This resulted in a wordy altercation between the plaintiff and the driver, which continued to the time when a lady entered the car, who delivered her five cents fare to the plaintiff, which he placed in his pocket. The driver afterwards insisted upon the plaintiff depositing this fare in the box. That the latter declined to do, and after the lady had reached her destination and left the car the driver removed the plaintiff from it and delivered him into the custody of a policeman. When the matter came before the court on the following morning the plaintiff was discharged. The plaintiff was clearly entitled to a restitution of the money deposited by him by mistake

in the box placed in the car to receive the fare of the passengers, and, as the driver himself was not authorized to return the fare, and in that manner correct the mistake, it was an entirely reasonable course to adopt for the plaintiff to receive the fare, which he did of the other passenger, and in that manner reimburse himself for the money inadvertently placed in the box. The regulation of the railway company requiring a passenger, who may be deprived of his money by his own mistake in this manner, to go to the office of the company for its reimbursement and the correction of the mistake is entirely unreasonable. As long as the car is placed under the charge and management of the driver, he should be, as a necessary part of that management, invested with authority to reimburse fares inadvertently placed in the box in this manner. The time to correct the mistake is when it may be made and discovered and the facts attending it fully known to the defendant's agent. To require the passenger to go to the company's office, which may be miles away from the place where the mistake may occur, and there establish his right to the reimbursement of the money, is so unreasonable in itself as to be exceeded only by a further regulation that when the money may be so deposited the party so depositing it shall forfeit all right to claim its return, for in most cases to go to the company's office and there satisfy the officials of the right to the return of the money, and defray the expenses attendant upon the journey and submit to the necessary loss of time, would be no less than a serious aggravation of the injury itself. The officers would probably require the statement of the driver before they would feel justified in acting at all, and in that manner render necessary more than one journey and one hearing to recover the amount the passenger would be entitled to receive. The large majority of people would prefer submitting to the first loss rather than enhance it, as they necessarily would, in endeavoring to obtain redress in this manner, and they should not be subjected, by the regulations or rules of the company, to any such risks and loss. As long as the company does not authorize the driver himself to rectify the mistake, it is no more than reasonable that the passenger should be at liberty to do so by receiving, for that purpose, the fare of any passenger afterwards entering the car. The driver, therefore, had no right, because of the refusal of the plaintiff to place this additional fare in the box, to

remove him from the car. He was a wrong-doer, and his act in laying his hands upon the plaintiff for that purpose was an assault and battery for which he might well himself have been indicted and punished.

But as he removed the plaintiff from the car and placed him in the custody of the officer, under the authority conferred upon him for the management of the car by the defendant, the latter became legally liable to the plaintiff for the damages to which he in that manner has been subjected, for, as the law has been settled, a railroad company is liable to the same extent as an individual for any injury done to a passenger by a person in the course of his employment who is in the service of the company. (*Ramsden v. Railway Co.*, 104 Mass., 117; *Higgins v. Waterohiet Turnpike Co.*, 46 N. Y., 23; *Hoffman v. R. R. Co.*, 87 id., 25; *Flynn v. R. R. Co.*, 49 N. Y. Sup. Ct. [17 J. & S.], 81; *Stewart v. Brooklyn and C. R. R. Co.*, 90 N. Y., 588.) And this liability will include the entire injury and indignity to which the plaintiff was subjected, not only by his removal from the car, but by his subsequent imprisonment and detention in the station-house. (*Rown v. Christopher, etc., R. R. Co.*, 34 Hun, 471.)

It has been urged, in support of the action taken at the trial, that the dismissal of the complaint was justified under chapter 186 of the Laws of 1880. But while there was evidence in a measure tending to prove disorderly conduct on the part of the plaintiff, it was controverted by his own testimony and that of other witnesses taken at the trial. Upon that subject a question of fact was created by this state of the evidence which could only be legally solved by submitting the case to the jury. It was likewise in the same condition as to the charge made at the station-house against the plaintiff.

On his part it was affirmed that he had been charged with a larceny, for which, under the circumstances, there was no possible excuse. But on the part of the defendant it was averred that the charge was that of disorderly conduct. So far as it was material to settle the precise character of the charge in the disposition of the case, the evidence was such as required it to be submitted to the jury. In no view was it a case for the dismissal of the complaint.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

BRADY, J., concurred.



DAVIS, P. J. (dissenting):

I cannot concur with the views of my brother DANIELS in this case. Assuming that the plaintiff put the wrong amount of fare in the box, it was no fault of the driver that he did so. There was no evidence of it but the plaintiff's assertion, but if that were true, the driver had no authority to correct the error. He had no access to the box, and could not return the deposited fare, and an attempt to do so by forcing open the box would have been unjustifiable on his part. As he was not permitted to receive fares he had no money of the company which he could use to correct the mistake. To clothe drivers with power to refund for alleged mistakes would subject the company to such frauds by collusion with claimants as would overturn all the safeguards adopted by the company to prevent the embezzlement of their fares by the driver or persons in collusion with him. A person who makes the mistake of depositing the wrong fare is responsible for the consequences of his own act, and is subject to all reasonable rules as to the mode of its correction. It is not unreasonable that he shall apply to the company, and not the driver. His carelessness brings this upon himself, and though it may be onerous to seek relief at the office, it is not unreasonable to require him to do so. But to hold that such a person, by reason of his mistake, is authorized to collect and keep the fares of other persons, is going altogether too far. It makes him judge, jury and executioner in his own case, a procedure which the law does not sanction. It would open a wide field for fraud and larcenies if every person who makes or asserts a mistake on depositing his fare may at once collect from incoming passengers whatever amount he chooses to assert that he has paid. The thieves of the city would do a thriving and profitable business on the cars if such a practice were held lawful. Besides, the taking of another fare by such a person is not payment of the fare by the passenger. He or she is bound to put it in the box, and intrusting it to a stranger is not discharging the obligation of the passenger, and especially is that the case when the passenger knows that the stranger intends to keep it on his claim of overpayment of his own fare. Such a rule as the opinion asserts would lead to the great embarrassment of innocent persons whose fares happened to be captured by one who made a mistake, or claimed he had made a mistake, in

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FIRST DEPARTMENT, OCTOBER TERM, 1886.

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depositing his own fare. The plaintiff in this case was guilty of a wrong in his attempting to rectify his mistake, if he had made one, in the manner he did. It led to the alleged arrest for which he was alone to be blamed.

I think, also, if he were charged by the driver the next morning with larceny the company were not responsible for that act. The plaintiff was in custody for disorderly conduct. The company had not authorized the driver to make another charge on the following day, and were not responsible if it were done.

I think the judgment should be affirmed.

Judgment reversed, new trial ordered, costs to abide event.

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SUSAN F. PLATT, RESPONDENT, v. ANNIE R. PLATT,  
APPELLANT, IMPEADED WITH OTHERS.

*Reference to determine as to the existence of judgments or liens on funds arising from a sale in partition — when a judgment recovered against the executors of the owner will be paid therefrom — interest cannot be charged on an amount advanced from the estate to persons entitled thereto out of the share of such person in the proceeds of sale.*

After an order had been made appointing a referee, to take proof and report the respective amounts which the defendants were entitled to receive of the proceeds arising from sales in three actions of partition, a motion was made for an order directing the referee to take proof of any liens that might be presented to him.

It was stated, in the moving affidavit, that there were liens which it was desirable and advantageous to have proved and brought before the court, but no lien was particularized or described, nor were any facts disclosed indicating the existence of any claim whatever of such a description in favor of any person, or which should justly be included in the hearing before the referee in order to enable him to determine the rights of the parties to the proceeds of the property.

*Held*, that the motion was properly denied on account of the defective condition of the moving papers.

Upon the application of one who had recovered a judgment, against the executors of the deceased owner of the land partitioned, upon a debt due from the deceased, and against a receiver of the estate appointed on the removal of the executors, the referee was empowered to inquire into the existence of such judgment.

*Held*, that the court had power to direct this to be done.

Upon the hearing it appeared that the judgment had been recovered by one De

FIRST DEPARTMENT, OCTOBER TERM, 1886.

Grauw, against the executors of Nathan C. Platt, the owner of the real estate partitioned, upon an indebtedness owing by the testator in his lifetime, and that upon this judgment another judgment was recovered against a receiver of the estate appointed after the removal of the executors.

*Held*, that as it appeared that there was no personal estate out of which the judgment could be paid, and that it was recovered upon a debt owing by the testator himself, it was equitably a lien upon his real estate, and upon the fund before the court, and that the creditor had the right to apply for the payment of the judgment out of the proceeds of this property, even though the judgment itself might not, under the statutes of this State, have become a lien upon the testator's real estate.

*Hyde v. Tanner* (1 Barb. 75), and *Scott v. Guernsey* (48 N. Y. 106) followed.

In determining the respective shares which each of the parties was entitled to receive, the amounts which certain of the parties in interest had received from the estate, previous to the time of the reference, were added by the referee to the aggregate of the funds arising from the sales of the real estate in the three different actions of partition, and charged against the shares of the persons who received the same, with interest thereon from the time of its receipt down to the time of the date of his report.

*Held*, that he erred in charging interest upon the amounts received, as there was no legal grounds upon which it could be computed or charged.

APPEAL by the defendant Annie R. Platt from two orders made on the 29th of May, 1886, denying an application for an order directing the referee to take proof of any liens that might be presented to him, and from an order directing the referee to take proof of judgments, and from an order confirming the report of the referee of the distribution of the proceeds of lands sold in three actions of partition.

A. J. Vanderpoel, for the appellant.

Marsh, Wilson & Wallis and Edward S. Clinch, for the respondent.

DANIELS, J. :

The parties more especially affected by the order, denying the application for an order to direct the referee to take proof of any liens that might be presented to him, are William R. Martin and his assignee, Edwin N. Martin. No such direction as was desired by these persons was contained in the order of reference, made for the purpose of ascertaining and determining the mode in which the moneys should be distributed, which had arisen from the sale of the property affected by the actions in partition. The application

for this order to extend the reference to any liens which might be presented to the referee, was made upon an affidavit of William R. Martin, which failed to authenticate or establish the existence of any lien whatever in his favor, or that of any other person. It was stated in this affidavit that the reference was proceeding to report upon the distributive shares of the parties in the proceeds of the sales of the land, and that there were liens that it was desirable and advantageous should be proved and brought before the court. No lien was particularized or described, neither were any facts disclosed indicating the existence of any claim whatever of such a description in favor of any person, or which should justly be included in the hearing before the referee to determine the rights of the parties to the proceeds of the property. It was on this defective affidavit that the motion was made, and the court was entirely right in denying the order which was applied for because of this condition of the papers.

The other order of the twenty-ninth of May was made upon an affidavit showing that judgments had been recovered which should be considered by the referee in ascertaining the disposition which should be made of the funds arising out of the sale of the property. And the order of reference, on that affidavit, was so far enlarged as to empower the referee to inquire into the existence of such judgments. This order was sufficiently supported by the affidavit produced on the application for it as to render it regular and proper, and the direction which was made by it entered into the hearing before the referee. This order, like the preceding order, should therefore be affirmed.

The order confirming the report of the referee, and directing the distribution which should be made of the funds in court, presents the more important subjects of inquiry arising in this controversy. The fund to be distributed, with interest upon it, amounted to the gross sum of \$237,366.07. It consisted of the proceeds of the sale of real estate in three different actions of partition, and as all the parties entitled to participate in the funds were the same in each case, they were properly aggregated into one gross amount. The property which had been sold to produce this fund was lands owned in his life-time by Nathan C. Platt, and the persons entitled, as devisees under his will, and under the will of one of his sons, to

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FIRST DEPARTMENT, OCTOBER TERM, 1886.

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the proceeds of this property were four in number. These persons, including two others, under whom two of the parties claimed had received amounts of money from the estate previous to the time of the reference and the order made confirming the report of the referee. The amounts which had been so received were added by the referee to the aggregate amount already mentioned, which still remained to be distributed. And in making such additions he seems to have proceeded with accuracy, and as he was directed by the judgment, for what had previously been received was a part of the testator's estate consisting of so much of the share as each party remained entitled still to receive. The other three parties do not contend that the referee erred in this respect. Neither has such a contention been presented in behalf of the appellant Annie R. Platt, so far as these amounts were brought into consideration to determine the distribution which should be made. The several amounts which had been distributed were ascertained and settled by a judgment in the Superior Court of the city of New York, wherein Catherine W. Cooke, one of the devisees of Nathan C. Platt was plaintiff and the other parties in interest and claimants were defendants, and to that extent this judgment appears to have settled the rights and obligations of the parties. But after charging against each one of the shares the amount received by the person charged, the referee proceeded to add to it interest down to the time of the date of his report. The aggregate sum so charged for interest against each of the shares very materially differed according to the amounts which had been received by the person charged, and that charged against the appealing defendant was about three times the amount of interest charged against either one of the other persons entitled to share in the division of these proceeds. This charge of interest was made on the sum of \$60,830.90, which had been received by her husband William H. Platt in his life-time, and under whose will she became entitled to his fourth of the proceeds of the property to be divided. The judgment settling the amounts which had been received by each of the claimants did not provide for the addition of interest upon the amounts which had been so received, neither could it have properly contained a direction of that description, for no indebtedness was created against either of these persons as the estate has turned out,

and no obligation whatever existed to refund any portion of the moneys which had been received. These moneys represented so much of the property of Nathan O. Platt which these persons were entitled legally to receive, and they were paid to the different individuals as so much of the share which he or she was entitled to in this estate. And being payments made in that manner they presented no legal grounds upon which interest should be computed or charged. The moneys were to no extent to be returned either at that time or at any time in the future by either of these persons. They may have been subject to the contingency that portions might be recalled if they proved to exceed the shares of the persons receiving the moneys, but no such contingency has appeared. On the other hand, the moneys received by each of the individuals were less in amount than their distributive shares of the proceeds of the testator's property. There was, accordingly, no basis upon which either of these persons should be charged with interest in this manner. And as the interest charged against the appealing defendant, Annie R. Platt, so largely exceeded the interest charged against either of the other persons, this addition of interest secured to them advantages over her which they were not entitled to enjoy in the distribution of these proceeds. To the extent of about \$10,000, the three other persons were benefited by this computation, which led to a charge against the appealing defendant to about that amount, over and above what should have been made against her. This will become more obvious by adding the several amounts which had been received upon the four shares in the estate to the proceeds of the property now to be distributed, and dividing that into four equal parts. These parts will represent the extent of the interest of each of the four parties in this estate, securing to the appealing defendant nearly \$10,000 over and above the amount awarded as her share. And to this extent the order confirming the referee's report and directing a distribution upon the basis of his computation, including these several interest charges, is erroneous and it should be modified accordingly. This modification can well be made by adding the several amounts necessary to show the principal of the estate to the sum now to be distributed, and then dividing that sum into four equal parts and from the part devised to William H. Platt, deducting the charges made against his widow,

Annie R. Platt, after excluding this interest charge of \$15,270.81 contained in the referee's statement of account, and the order should be so modified.

Under the direction given to the referee to inquire as to judgments against the property it was proved before him that a judgment had been recovered by Aaron J. De Grauw against the executors of Nathan C. Platt, upon an indebtedness owing by him in his life-time. They were removed from their offices by a judgment or proceeding taken partly for that purpose, and James M. Smith was appointed the receiver of the estate, and upon the judgment recovered against the executors another judgment was recovered against him as receiver. This was for the sum of \$24,414.02 from which, by the application of another demand, the sum of \$11,858.28 was deducted, leaving unpaid upon the judgment the sum of \$15,651.33. One-quarter of this judgment was charged against the share of Annie R. Platt in the proceeds of this property, and that has been complained of as an erroneous direction sanctioned by the referee and approved by the final order. The correctness of this determination has been questioned upon the ground that the judgment could not be made a charge upon the proceeds of the estate otherwise than by proceeding against the persons receiving such proceeds as devisees. But this objection does not seem to be entitled to be sustained, for it was one of the objects of the court to determine what judgments existed which should be paid out of the fund before it was distributed. And while it has been suggested that the appealing defendant might have legal grounds for contesting the right of the judgment creditor to payment, no such proof was either given or offered upon the hearing before the referee. If there were any legal objections to the payment of the judgment, there was not the slightest obstacle in the way of presenting them upon the hearing before the referee. But no effort was made on that hearing to impeach the judgment or to show that the claimant of the balance remaining unpaid upon it was not entitled to the money.

It was not made to appear that any personal estate of the testator, Nathan C. Platt, remained undistributed, and the facts appearing are such as to justify the conclusion that no such estate did remain, for the fund now in court appears to have been assumed to be all that

was left to dispose of in this proceeding. And as there is no personal estate out of which the judgment could be paid, and it has been recovered upon a debt owing by the testator, Nathan C. Platt himself, it was equitably a lien upon his real estate and the fund now before the court representing it. A point of this nature was considered in *Hyde v. Tanner* (1 Barb., 75), where the right of a creditor having such a demand to follow the real estate of the testator was maintained by the court. And that case does not seem to have been questioned or impaired in its authority by any determination since made upon this subject. Under the rule which it maintains the creditor had the right to apply for payment of the judgment out of the proceeds of this property, even though the judgment itself might not, under the statutes of this State, have become a lien upon the testator's real estate. The debt itself was so chargeable without reference to the provisions of the statute cited in support of this part of the appeal, and the court was right, having equitable authority in the action, in providing for its payment as that was done by the order. (*Scott v. Guernsey*, 48 N. Y., 106.)

It was proposed to be proved upon the hearing before the referee that William R. Martin, as attorney in the action brought for the recovery of the property, had become entitled to one-half of the amount to be distributed. The referee rejected this proof, and in that he seems to have been justified by the refusal of the court in one of the orders now appealed from to direct the referee to inquire into the existence of any such lien. Beyond that the judgment in the case of *Cooke v. Platt* and others was produced and proved before the referee. In that action this claim of William R. Martin was considered, and it was determined by the court to have no legal existence, and for that reason likewise the referee was right in rejecting the proof offered to maintain the existence of this asserted lien or agreement. Neither in this respect, nor in any other except that which has already been considered, does the referee appear to have erred in the conclusions arrived at by him. The final order should be modified by directing the shares of the appealing defendant to be ascertained by excluding the interest charges made and contained in the referee's report, against the amounts received by each of the four persons interested in this estate. And her share should be ascertained and declared according to the amount charge-



able against herself and her husband, excluding this item of interest. And as so modified, this order should be affirmed without costs, but as to the other two orders from which appeals have been taken, they should be affirmed with the usual costs and disbursements.

DAVIS, P. J., and BRADY, J., concurred.

Orders denying applications for orders directing the referee to take proof, etc., affirmed with ten dollars costs and disbursements; and order confirming the referee's report modified as directed in opinion, and as modified affirmed without costs.

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WILLIAM M. KINGSLAND, AS SURVIVING TRUSTEE, ETC.,  
PLAINTIFF, v. THE MAYOR, ALDERMEN AND COM-  
MONALTY OF THE CITY OF NEW YORK AND OTHERS,  
DEFENDANTS.

*Submission of a case upon agreed facts — Code of Civil Procedure, sec. 1279 — power of the court to amend the agreement as to the relief to be granted — when the power will not be exercised.*

A case having been agreed upon and submitted to the court, under the authority of section 1279 of the Code of Civil Procedure, a judgment was ordered in favor of the plaintiff for the recovery of damages because of the unlawful interference of the defendants with the plaintiff's property, consisting of a bulk-head and wharf fronting upon the Hudson river, pursuant to a provision in the agreement defining the relief to which the plaintiff would be entitled if successful. After this decision had been made, and the judgment had been entered upon it, it was stated that the Court of Appeals had decided that the owners of the wharf were entitled to the structure erected in front of it by the city, thereby extending their water front so much further into the river.

*Held*, that a motion, made by the plaintiff to amend the claim for relief in the case submitted, so as to secure to him the benefits of this decision by awarding to him the possession of the additional structure itself, instead of damages for the act of the defendants, should be denied, as it would not be a provident use to make of any power which the court might possess, to grant such amendments, to interfere with and change this part of the agreement, after the case itself had been heard and decided, and the rights and obligations of the parties had been declared and defined by the judgment which has been entered.

*It seems*, that the court had no authority to change that part of the agreement made by the parties, as to the relief which should be awarded to the plaintiff, in case it should be held that he was entitled to recover. (*Per* DANIELS and BRADY, JJ.)

MOTION by the plaintiff to amend the claim for relief in a case submitted upon an agreed state of facts.

*W. W. MacFarland and Stewart & Boardman*, for the plaintiff.

*James C. Carter and E. Henry Lacombe*, for the defendants.

DANTELS, J. :

The case was agreed upon and submitted to the court under the authority of section 1279 of the Code of Civil Procedure. It was argued by counsel and after being considered by the court a judgment was ordered in favor of the plaintiffs under the agreement made a part of the case defining the relief to which the plaintiffs, in the event of their success, would be entitled. And that was for the recovery of damages because of the unlawful interference of the defendants with the plaintiffs' property, consisting of a bulk-head and wharf fronting upon the Hudson river. Since this decision was made, and the judgment has been entered upon it, the Court of Appeals have decided, in the case of *Steers v. City of Brooklyn* (101 N. Y., 51), that the owners of the wharf are entitled to the structure erected in front of it by the city, and thereby extending their water front so much farther into the river. And the object of the motion is to secure to the plaintiffs the benefit of this decision by awarding to them, instead of damages for the act of the defendants, the possession of the additional structure itself. The right to this relief was not placed in controversy by the case agreed upon between the parties, but it was expressly limited to that of damages for the interference of the defendants, by which the water front of the plaintiffs' property was destroyed, by reason of the structure erected in front of it by the defendants. The authority conferred upon the court over the subject-matter of the action was defined and limited by this agreement of the parties. It was to award to the plaintiffs, in case of their success, remuneration by way of damages, and no other or different relief. And it may very well be if the relief, which is now the object of the motion, had been insisted upon, that the defendants would not have submitted the case by agreement to the judgment of the court. But whether they would or not, inasmuch as the parties by their well considered and deliberate agreement, have limited the court in the relief which should be awarded, to that of compensation by

way of damages, it probably has no further control or authority over the controversy than that which they have in this manner specified and declared. They have agreed upon the facts of their case, and declared the relief which should be awarded if those facts entitled the plaintiffs to redress. In *Fearing v. Irwin* (55 N.Y., 486) it was held, in submissions of this description, that the court is confined to the facts agreed upon, and can make no inferences or in any way depart from or go beyond the statement presented. And that would seem to be the just construction required by the acts of the parties in the submission of controversies in this manner.

It is true that by section 1280 upon filing the submission the controversy becomes an action in the court to which the provisions of the law relating to proceedings in actions are subsequently applicable. But this section was not designed to confer upon the court the power to change the agreement of the parties, but only that of conforming to the provisions applicable to proceedings in actions in the determination and disposition of the controversy. As the facts are now presented the court has probably no authority to change the part of the agreement made by the parties as to the relief which should be awarded to the plaintiffs in case it should be held they were entitled to recover. But if it had the authority, it would not be a provident use to make of it to interfere with and change this part of the agreement, after the case itself had been heard and decided, and the rights and obligations of the parties have been declared and defined by the judgment which has been entered.

In the case of *Henry K. S. Williams v. The Mayor, etc., of the City of New York* a like motion has been made depending upon a similar state of facts, and as it should not be allowed to prevail in the case of *Kingsland* and others, it follows that it should not in the case of *Williams*.

The motion should be denied, with the usual costs.

BRADY, J., concurred.

DAVIS, P. J. :

I concur on the ground that it would be an injudicious exercise of discretion to exercise the power of amendment under the circumstances of this case.

Motion denied, with ten dollars costs.

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88 328THE CENTRAL TRUST COMPANY OF NEW YORK,  
APPELLANT, v. THE NEW YORK CITY AND NORTHERN  
RAILROAD COMPANY, RESPONDENT, IMPEADED WITH  
GEORGE S. SCOTT, APPELLANT, AND OTHERS, RESPONDENTS.

*Practice—power of the court to order a reference to take testimony as to facts and to refuse to enter an interlocutory judgment—such an order is appealable—Code of Civil Procedure, sec. 1347, sub. 4.*

In this action, brought to foreclose a mortgage given by the defendant railway company to secure an issue of bonds, amounting to the sum of \$4,000,000, the right of the plaintiff to this relief was resisted by the railway company and other defendants, who denied the legal validity of the bonds. Upon a trial of the issues raised by the pleadings, the court concluded that the bonds had been unlawfully issued, and that they were voidable at the election of the railway company, with the exception of those which had passed into the hands of holders for value, without notice, and made an order of reference directing the referee to inquire who were the holders of the bonds in controversy, and for what they had been acquired and what consideration had been paid for the bonds by their present or preceding holders.

*Held*, that an objection to the order, founded upon the claim that the court, having reached the decision that it did, should have directed that an interlocutory judgment be entered embodying findings of fact and law which might be reviewed by the parties by way of an appeal or a motion for a new trial, should not be sustained, as the system of practice now existing did not require that an interlocutory judgment should be entered as the result of such a decision, but permitted the court to hear the case fully and completely and determine the same by a final decree.

That the order affected a substantial right, and was reviewable upon the merits upon an appeal taken under subdivision 4 of section 1347 of the Code of Civil Procedure.

APPEAL from an order directing a reference and denying an application for a settlement of a case and exceptions, and the making of findings of fact and law, and also a motion by the respondent to dismiss the appeals.

*William Allen Butler, Julien T. Davies and Edmond Lyman Short*, for the appellants.

*James C. Carter and Lewis Cass Ledyard*, for the respondents.

DANIELS, J. :

The action was brought to foreclose a mortgage given by the railway company, upon its property, to secure an issue of bonds amounting to the sum of \$4,000,000. The right of the plaintiff to this relief was resisted by the railway company and others contesting the legal validity of the bonds. The result of the trial of the issues, including these subjects, was the conclusion of the court that the bonds had been unlawfully issued, and that they were voidable at the election of the railway company, with the exception of those which had passed into the hands of holders for value, without notice. After reaching this conclusion, the order of reference was made directing the referee to inquire who were the holders of the bonds in controversy and for what they had been acquired, and what consideration had been paid for the bonds by their present or preceding holders. Other subordinate directions were given, but it was for the object of more especially and fully obtaining information upon these subjects that the reference was ordered. This order of reference has been resisted on the ground that when the court reached the decision that it did, an interlocutory judgment should have been entered, embodying findings of fact and law which might be reviewed by the parties, by way of an appeal or a motion for a new trial. But the system of practice now existing has not required that an interlocutory judgment shall be entered as the result of such a decision. Neither was the practice mandatory in this respect, as it previously existed in courts of equity in this State, for they were at liberty to hear the case fully and completely and determine it by a final decree; or, which was the more ordinary system followed, to direct an interlocutory decree, when that should be proper, providing for further proceedings to ascertain details for the relief before a master. The jurisdiction of the court sanctioned either one of these two proceedings, as they might be deemed the most practical or advisable. And the present system of practice has made no change in this respect in trials of issues of fact in equity actions, for it contains no direction that an interlocutory judgment shall be entered upon the determination of the court as to the controlling rights of the parties in the litigation. The Code has been framed in such language as to permit, without requiring, an interlocutory judgment, and to provide for exceptions

to be presented and filed and a review to be had, either by way of appeal or a motion for a new trial; and these provisions will be found to this effect in sections 1200, 1349, 1001 and 1231. But even such an appeal or motion is not indispensable for the review of the judgment, for that may be had upon an appeal from the final judgment, when the intention to review, on such appeal, the interlocutory judgment, shall be expressed in the notice. (Code, §§ 1230, 1301, 1316 and 1350.) But neither of these sections has been so framed as to require an interlocutory judgment to be entered in the action in which a trial may be had before the court or a referee; but they, at most, regulate the practice authorized to be pursued when such a judgment shall have been entered in the action. The mandatory provisions, directing that a report shall be made and filed, relate only to the determination of the whole issue, and they are contained in section 1012 and subdivision 3 of section 1221. Such a report or decision, then, becomes indispensable for the determination of the controversy in the action.

That it was not intended to be obligatory upon the court to make and file this decision before the final determination of the action, is further evident from the latter portion of section 1013 of the Code, which permits the court, of its own motion, in an action triable without a jury, to direct a reference to a referee to report his finding upon one or more specific questions of fact involved in the issue. That must necessarily be done before the complete decision of the action, and it is after that, and when the remaining issues in the case have been tried, that it has provided by section 1226 for the entry of the judgment. And the reference ordered in this case seems to be within the language of this section.

By section 1015, also, the court has been authorized, of its own motion, to direct a reference to take an account, either after an interlocutory or final judgment, or when it is necessary to do so for the information of the court. And under this authority this reference seems to have been directed, and that was suggested as correct practice in *Camp v. Ingersoll* (86 N. Y., 433). This authority, it is true, is restricted to the taking of an account, but this language includes more than the mere adjustment of items, charges, credits and figures. It permits inquiries to be made in this manner where details are to be obtained and settled, and such

was the practice which has been followed in courts of equity- (Story's Eq. Jur. [5th ed.], §§ 441, 453.) In the last of these sections it is stated that "In virtue of this general jurisdiction in matters of account, courts of equity exercise a very ample authority over matters apparently not very closely connected with it, but which, naturally, if not necessarily, attach to such jurisdiction." What the court required in this case was a statement of the bonds which the railway company had attempted to issue under the mortgage, and that was, strictly speaking, a matter of accounting, as inquiries of this nature have been set on foot and followed in courts of equity. And, as incidents of that accounting, it was within the authority of the court to direct proof to be taken as to the manner in which the bonds had passed into the hands of the parties holding them, and the consideration for which they had been taken. The inquiry as to all these subjects was, within this broad authority, allowing a court to direct a reference to take the account. The plain object was to furnish the data upon which the details of the action might be determined, and when the report of the referee shall be made and heard; that, as well as his conclusions, are subject to be reviewed, corrected or set aside, as the case may require, under the authority of section 1232 of the Code.

To enable the referee intelligently to take proof upon, and hear and report concerning the subject of the reference, no other statement of that subject was required than that which was contained in the order. An interlocutory judgment was not necessary for this purpose. The action still remained before the same court, although the proof upon the essential issues, as the pleadings presented them, had been concluded, and the court on that part of the case had reached what was considered a final decision. But it was not in a condition finally to determine, or declare, the particular rights of the parties. This further information to be sought through the intervention of a reference, was to complete the trial, and when it shall have been obtained, the court will be in a condition to proceed and determine the case by a final judgment. And before that can be entered conclusions of fact and law will be required to be settled and filed, presenting what shall be deemed to be the results of the evidence and the rights and obligations of the parties. And it will facilitate this determination to obtain the proof and report

contemplated by the order, and place the action in a condition in which upon an appeal all the questions arising in it, may be finally decided, and the rights of the parties fixed and determined.

If an interlocutory judgment had been provided for, no more than this would have been accomplished through its intervention, for the ultimate and final decision of the action would, if the views of the trial court should be sustained, still await the hearing and accounting directed by this order.

The order does affect substantial rights in the action. And it is the subject of an appeal under subdivision 4 of section 1347 of the Code of Civil Procedure. And while it was regular for the court to make the order within the authority of the sections of the Code already mentioned, it is still reviewable under this subdivision and subject to correction if the inquiries directed by it should be held to be broader than the court had the power to give. Whether the decision made by the court upon the effect of the evidence produced before it is erroneous, or not, is not now to be considered. That subject has not been discussed by the counsel, but the suggestion has been made on behalf of the plaintiff that a day should be assigned for an argument of the merits of the controversy; and if that is still to be insisted upon by the counsel, the case may yet, as the order is appealable, be brought before the consideration of the court for the determination of the questions arising upon the evidence. But probably the more judicious course of proceeding will be to complete the hearing before the referee and then bring up these questions for review after final decision and judgment shall have been entered. For the present, however, it will be sufficient to hold that the reference was authorized, if the court was warranted in the conclusions upon which the order proceeded. The parties affected by the order were entitled by their appeal to bring it before the court for its consideration and decision; but to avoid any conclusive effect from it hereafter, the order should be modified, declaring that the reference is without prejudice to the consideration of any questions arising upon the trial whenever any legal action shall be taken for their review in the subsequent progress of the litigation. With this modification the order of reference, as well as that denying the application for findings of fact and law, should now, subject to the plaintiff's right to bring on the merits of the appeal, be



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 FIRST DEPARTMENT, OCTOBER TERM, 1886.
 

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affirmed, and the motion made to dismiss the appeals should be denied, without costs to either party.

DAVIS, P. J., and BRADY, J., concurred.

Order modified as directed in opinion and affirmed as modified without costs, and motion to dismiss appeal denied without costs.

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IN THE MATTER OF THE GUARDIANSHIP OF ANNIE C. KING  
AND OTHERS.

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*Proceedings for the removal of a guardian — may be commenced by a petition — the Supreme Court has power to remove a testamentary guardian.*

This proceeding was instituted by a petition presented by an executor of the will of E. R. B. King, deceased, to have the testamentary guardian of the infant children of the deceased removed, upon the ground that the guardian was not a competent and proper person to have the care and custody of the children.

*Held*, that an objection that the proceedings could not be lawfully commenced by petition, but that they should have been commenced by the service of a summons, was not maintainable.

That the further objection, that the Supreme Court had no authority to remove a testamentary guardian, was equally incapable of being maintained.

That as the court had the authority to deprive a parent himself of the custody of his children, where that was proven to be necessary for their benefit, it must certainly be equally authorized to remove a guardian who derives his or her authority wholly from the parent.

APPEAL by Phoebe F. Fullerton, testamentary guardian, from an order confirming the report of a referee and removing her from her guardianship of Annie C. King and others.

*Christopher Fine*, for the testamentary guardian, appellant.

*Joshua M. Van Cott*, for the petitioner, Donald Mackay, Executor of Elizabeth R. B. King.

DANIELS, J.:

The proceedings were instituted by a petition presented by Donald Mackay, an executor of the will of Elizabeth R. B. King, the mother of the infants, who by her will appointed Phoebe Fullerton, the appellant, for their testamentary guardian. The objec-

tion has been taken in the outset that the proceeding could not be lawfully commenced by petition, but that it should have been done by a summons, the process provided for commencing an action at law, or in equity. But the practice in this class of cases has been to proceed in a summary manner by petition, and it does not appear to have been intended to be dependent upon or restricted to the ordinary proceedings in an action. It has been urged that the case of *Livingston* (34 N. Y., 555), proceeded upon a principle adverse to this practice, but while the subject of the right to proceed by petition was there considered, it was not held or decided that this course of practice was improper. The general principle relating to it was on the other hand mentioned with approval, and that allows a petition to be presented in any matter "over which the court has jurisdiction by some act of the legislature or other special authority." (*Id.*, 569.) And to the same effect is 2 Barb. Ch. [2d ed.] 579, note 2; and as the proceeding has been described in *Wilcox v. Wilcox* (4 Kernan, 575), a petition would be the proper mode for commencing it. The proceeding has been commenced by a petition under the latter branch of the rule just mentioned, as that has been provided for and sanctioned by the special authority of the court. It is not an action as that has been defined, for the reason that it is not necessarily brought to maintain or enforce a right of the petitioner, or to redress a wrong suffered by him, which are the objects of actions prosecuted in courts of justice. Strictly what an action may be now designated to be has not been defined in the present Code of Civil Procedure. What it contains on this subject is the statement made in subdivision 20 of section 3343, and that is, that the word action refers to a civil action, which is no more intelligible than many other portions of this code. The preceding Code by subdivision 2 of section 1 was more clear and explicit in its definition, and that defined an action to be a regular judicial proceeding in which a party prosecutes another for the enforcement or protection of a right or the redress or prevention of a wrong, and declared every other civil remedy to be a special proceeding. This definition was clear and apt and entirely consistent with the preceding as well as subsequent understanding of the distinction between an action and a special proceeding.

This proceeding has not been brought for the protection or enforcement of any right of the petitioner, or to redress any wrong sustained by him, but to inform the court of the existence of certain facts upon which the exercise of its paternal authority has been invoked in behalf of these infants. That authority is well established as a fundamental element of the law, and it requires the court, whenever a proper case may appear for that purpose, to interfere for the protection and welfare of infant children. It does not require, to be set in motion, that the party supplying the information shall disclose an injury to himself, or that any right he may be entitled to enjoy is in danger of being put in jeopardy. What he is required to do is to inform the court of such a state of facts as will render it evident that it should interpose for the protection of persons dependent upon it, as infants are, and when that information is supplied it is the court which acts and directs the proceedings found to be necessary to fully inform itself and indicate what action in the premises may appear to be proper. And this is one of the peculiar proceedings not originating in any legislative act, but prescribed and followed by the court as the best adapted to the necessities of such cases. The case is of such a description as ordinarily to require summary action, free from the intricacies and delays of an ordinary suit, and that it is the appropriate mode through which this action of the court is to be obtained is evident from this being the course of proceeding ordinarily taken for this purpose. The fact that actions are not resorted to for the purpose of inquiring into the conduct, competency or character of guardians is a strong argument against the correctness of the objection which has been urged upon this subject by the counsel for the appellant. Both principle and practice sanction this course of proceeding, and this objection must be still held, as it already has been, to be untenable.

The further objection that the court has no authority to remove a testamentary guardian is equally incapable of being maintained, for in the exercise of its authority it has often interposed to divest the parent himself of the custody of his child or children, where that may be proven to be necessary for their benefit. (*Matter of Watson*, 10 Abb. N. C., 215; *Matter of Waldron*, 13 Johns., 418; *People ex rel. Brush v. Brown*, 35 Hun, 324.)

And as long as the court has the authority of depriving the natural guardians of the custody of their children, it certainly must be equally authorized to remove a guardian deriving his or her authority wholly from the parent. For it follows that the parent must be incapable of delegating any more complete or irrevocable authority than he or she can be held to possess. The rule upon this subject has been broadly stated in 2 Story's Equity Jurisprudence ([5th ed.], § 1339), to include all guardians, testamentary, as well as those otherwise appointed. And while the cases referred to, in support of the proposition, do not nominally include a testamentary guardian, the principle maintained by them is so broad as not to justify an exception to its operation in his or her favor. The object and purpose of the interference of the court is to secure the safety and promote the welfare of the children themselves, and wherever it becomes necessary for these objects to interpose, the custody and care of infants will, in all cases, be provided for as that can best be secured. For these purposes it has been rightly said "that the court interferes with the ordinary rights of parents as guardians by nature, or by nurture, in regard to the custody and care of their children. For though, in general, parents are intrusted with the custody of the persons and the education of their children; yet this is done upon the natural presumption that the children will be properly taken care of and will be brought up with due education in literature and morals and religion; and that they will be treated with kindness and affection. But wherever this presumption is removed: whenever, for example, it is found that a father (for example) is guilty of gross ill-treatment or cruelty towards his infant children, or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery, \* \* \* or that his domestic associations are such as tend to the corruption and contamination of his children, or that he otherwise acts in a manner injurious to their morals or interests; in every such case the Court of Chancery will interfere and deprive him of the custody of his children, and appoint a suitable person to act as guardian and take care of them and superintend their education." (2 Story's Eq. Jur. [5th ed.], § 1341.) And in its general bearing and extent the same principle is recognized and approved in *Matter of Welch* (74 N. Y.,

299); and it follows from this ample authority of the court to deprive the parent of the custody of his children, where that may be found to be necessary for their protection, education and maintenance, that it may also deprive a testamentary guardian of such custody. \* \* \*

[The judge then reviews at length the evidence and facts established thereby, and reaches the conclusion that the order of the court below, removing the guardian, should be affirmed.] **REP.**

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed, without costs.

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HART Z. NORTON AND ELDRIDGE D. NORTON, RESPONDENTS, v. CHRISTOPHER B. KEOGH, APPELLANT.

*Evidence — the rule excluding oral evidence, tending to vary the terms of a written agreement, does not apply to one who is a stranger to it.*

This action was brought to recover the amount due to the plaintiffs for labor and materials furnished by them, as plumbers, in erecting eighteen houses upon property belonging to the defendant. The plaintiffs commenced to work under a written agreement made between them and one Birdsall, who was to perform the work. Birdsall having died, after about one-third of the work was done, the defendant took charge of it and directed the plaintiffs to proceed with its performance.

The defendant, in his answer, stated that he assumed Birdsall's obligations and rights under the agreement, but that the quantity, style, finish, workmanship, quality and all other matters pertaining to the plumbing and gas-fitting were embodied in written specifications and plans which were submitted to and examined by the plaintiffs and formed the basis of the agreement with Birdsall. Upon the trial the defendant undertook to show the contents of these written specifications by the cross-examination of the plaintiffs, but was not permitted to do so upon the ground that as the specifications were not referred to in the written agreement, such evidence was inadmissible.

*Held*, that the referee erred in so ruling.

That as the defendant was a stranger to the agreement, the rule excluding oral evidence to add to, enlarge or restrict a written instrument did not apply.

APPEAL from a judgment in favor of the plaintiffs entered upon the report of a referee.

*W. T. Birdsall*, for the appellant.

*A. M. & G. Card*, for the respondents.

DANIELS, J. :

The judgment was recovered for the amount of the plaintiffs' bill for labor and materials as plumbers, in eighteen houses erected upon the property of the defendant. They were not employed to do the plumbing by him or any person acting under his authority, but commenced the work under a written agreement made between them and Anson B. Birdsall, having it in charge, or being the person who was to perform it. He died after about one-third of the work had been done, and the defendant then took charge of it and directed the plaintiffs to proceed with its performance, which they afterwards did. By his answer it was stated that he assumed Birdsall's obligations and rights under the agreement and became entitled to its benefits. But it was further stated in this part of the answer that the quantity, style, finish, workmanship, quality and all other matters pertaining to the plumbing and gas fitting, were embodied in written specifications and plans submitted to and examined by the plaintiffs and forming the basis of their agreement with Birdsall. And upon the trial of the action the defendant proposed, by the cross-examination of the plaintiffs, to prove these specifications. They were not referred to in the agreement itself, and when the proof was offered it was objected to by the plaintiffs "for the reason that the paper speaks for itself and is embodied in a written instrument, and any conversation that took place prior to that time would not now be admissible. It is illegal and improper." This objection was sustained by the referee and an exception was taken to the ruling by the defendant. And questions which were put to the witness following this exception, designed to prove that there were specifications, were excluded by the referee. The witness did, however, state that he never saw the papers shown him that he knew of, but that was not sufficient to correct the errors in the preceding ruling if they were improperly made.

And that they were improperly made results from the authorities defining the rule, under which the referee excluded the evidence, for the defendant was not stated in the agreement to be a party to it; neither did it in any manner refer to him, but he was a stranger

to the agreement, assuming its performance after the death of Birdsall, upon the understanding mentioned by him that it proceeded upon and followed the acceptance of the specifications. And if that were the fact he was entitled to show it by the evidence proposed to be given on the trial, for the rule excluding parol evidence to add to, enlarge or restrict a written instrument does not apply to a person who is a stranger to the agreement. (*Overseers, etc., v. Overseers*, 10 Johns., 229; *McMaster v. President, etc.*, 55 N. Y., 223; *Brown v. Thurber*, 77 id., 613.)

It sustains the agreement, when reduced to writing and subscribed by the party, against the effect of such evidence when offered by him, or in favor of others standing in privity with him. But such was not the relation of the defendant to this agreement, for this term "privity" has been defined in law to include only mutual or successive relationships to the same rights of property. (1 Green. on Ev. [7th ed.], § 189.) And it was so considered and understood in the case of *Campbell v. Hall* (16 N. Y., 575).

What the defendant was entitled, under his answer, to prove was that he had adopted and assumed Birdsall's agreement, so far as it had been made upon the basis of the written specifications proposed to be proved. And if he had made such proof, then the plaintiffs would be entitled to recover in the action only as their work was done in conformity to the specifications; and where they had failed in that respect, they might very well be liable, in damages, for their omission or defective work to the defendant.

The subsequent proceedings, upon the trial, were not such as to obviate the effect of the rulings made as to this proof by the referee; and because of these rulings, and others made concerning evidence received by him not free from difficulty, the judgment should be reversed and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed, new trial ordered, costs to abide event.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
NICHOLAS HAUGHTON AND JOHN J. MORRIS v.  
WILLIAM S. ANDREWS AND JOHN VON GLAHN.

*Commissioners of excise in the city of New York—may be appointed by the mayor without confirmation by the board of aldermen— 1884, chap. 43.*

Under the authority conferred upon the mayor of the city of New York by chapter 43 of 1884, which directs that "all appointments to office in the city of New York, now made by the mayor and confirmed by the board of aldermen, shall hereafter be made by the mayor without such confirmation," the mayor is authorized to appoint commissioners of excise, and no confirmation of such appointment by the board of aldermen is now required.

CASE submitted for the decision of the court upon an agreed statement of facts.

*A. J. Dittenhoefer and Elliott Sandford, for the plaintiffs.*

*Charles W. Dayton, for the defendants.*

DANIELS, J. :

The relators, with another person, were appointed by the mayor and aldermen of the city of New York as commissioners of excise for a term of three years from the 1st of May, 1883, and until other commissioners should be appointed in their places. On the 1st of May, 1886, the mayor of the city of New York appointed William S. Andrews a commissioner of excise for the city in place of Nicholas Houghton, and Charles H. Woodman in place of William P. Mitchell, and John Von Glahn in place of John J. Morris. The relators deny the power of the Mayor himself to make these appointments. They were made by him under the authority of chapter 43 of the Laws of 1884, entitled "An act to center responsibility in the municipal government of the city of New York." This act took effect on the 1st day of January, 1885, and, by its first section, it was directed that "all appointments to office in the city of New York, now made by the mayor and confirmed by the board of aldermen, shall hereafter be made by the mayor without such confirmation."

That appointments to the offices of excise commissioners were, previous to the enactment of this law, made in the city of New



York, has not been denied by the plaintiffs. Neither can it be denied that such appointments were made by the mayor and confirmed by the board of aldermen; and that would seem to bring the offices strictly within the act, even though the counsel may be right in the position taken that they are officers appointed to execute State authority.

The law providing for this manner of appointment was enacted by chapter 175 of the Laws of 1870. This act, by its second section, provided for the appointment of commissioners in each of the cities of the State, except the cities of New York and Brooklyn, by the mayor of such city himself, but in the cities of New York and Brooklyn it was required that "the mayor should nominate three good and responsible citizens to the board of aldermen of such cities, respectively, who should confirm or reject such nominations. In case of the rejection of such nominees, or any of them, the mayor (it was directed) shall nominate other persons as aforesaid, and shall continue so to nominate until the nominations shall be confirmed." This enactment was in the same form carried into and repeated in section 2 of chapter 145 of the Laws of 1879; and it was again, in the same language, re-enacted by section 109 of chapter 410 of the Laws of 1882, known as the "consolidation act."

Under each of these laws the commissioners of excise in the city of New York were required to be nominated by the mayor, and confirmed by the aldermen, to make their appointments legal or complete to these offices. The object of the first of these laws, as that was considered in *Board of Excise v. Garlinghouse* (45 N. Y., 249), was to make the commissioners of excise, when so appointed, boards of the city in which their appointments should be made. This was declared to be the effect of the enactment contained in the law of 1870, for there it was said that the principal purpose of the act "seems to have been to change the excise boards from county boards to town, village and city boards so, that each locality would be assured of that personal knowledge, supervision and vigilance, deemed to be indispensable to the proper discharge of the important duties committed to their charge, in determining the proper persons to whom licenses should be granted, as well as the circumstances justifying the exercise of that power." (*Id.*, 251.)

But whether these laws had the effect of changing commissioners

of excise, appointed in the cities, to city officers or not, it is unnecessary further to discuss or determine. For, under the statutes preceding the law of 1884, whatever may have been their official standing, they were required to be nominated by the mayor and confirmed by the board of aldermen, when the appointment should be made in the city of New York. And it was to change the tenure of office or mode of appointment in this respect that the act of 1884 was passed. And it was so enacted as to include all appointments to offices in the city of New York made by the mayor and confirmed by the aldermen. The appointments of commissioners of excise were such appointments to office, as in this statute in this manner has been mentioned. And as it was made to include all such appointments as might previously be made by the mayor and confirmed by the board of aldermen, it necessarily included the offices of commissioners of excise. The mayor, accordingly, without the confirmation of the board of aldermen, was empowered by this act of 1884 to make the appointments for excise commissioner, which he did. And it follows that judgment should be directed for the defendants, without costs, upon the case submitted by the parties for the consideration and decision of the court.

DAVIS, P. J., and BRADY, J., concurred.

Judgment ordered for the defendants, without costs.

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THE PEOPLE OF THE STATE OF NEW YORK v. THE  
UNIVERSAL LIFE INSURANCE COMPANY.

(SARAH F. BIRNBAUM, APPELLANT.)

*Receiver of insolvent insurance company—duty of, as to payment of unpreferred claims—no deduction for payments made before his appointment can be made.*

In proceedings instituted against the Universal Life Insurance Company, in Virginia, in 1878, the appellants, who were residents of Virginia, having procured judgments against the company upon policies issued to them, received, on December 21, 1880, a portion of the amounts due thereon under a decree of a Virginia court distributing the proceeds of securities which had been deposited in that State for the benefit of policyholders. On December 17, 1881, the company

was adjudged by the courts of the State of New York to be insolvent, and a receiver was appointed, to whom the policies owned by the appellants were presented, a dividend being claimed upon the balance remaining unpaid in the same proportion as should be paid on other demands against the company.

*Held*, that it was error for the court to charge against and reduce the dividend payable upon such claim by the amount which had been paid upon these policies under the proceedings in the State of Virginia

*Hunt v. Knickerbocker Life Insurance Company* (101 N. Y., 636), distinguished.

Under the statutes of this State, the receiver of an insolvent corporation is bound to apply the assets or their proceeds remaining in his hands, after the payment of debts entitled to a preference under the laws of the United States, and judgments, so far as they are liens upon the real estate of the corporation, equally among all its other creditors, as their demands existed at the time of his appointment.

No authority has been given to a receiver, or to the courts regulating his proceedings, by which one class of creditors shall be wholly or partially excluded from their proportionate part of the assets of the company, by reason of previous payments made upon their debts before the appointment of the receiver.

APPEAL from an order overruling an exception to the report of a referee, and affirming his report.

*Raphael J. Moses, Jr.*, for the appellant.

*Charles J. Everett*, for the receiver, respondent.

DANIELS, J.:

In this action a receiver was appointed on the 17th of December, 1881, of the property and effects of the defendant as an insolvent insurance corporation.

The appellants were insured by policies issued by the company in various amounts. They were residents of the State of Virginia, and after similar proceedings had been previously instituted against the company in the State of Virginia, they proceeded, as they were authorized to do by its laws, to appropriate, toward the payment of their policies, securities which had been deposited in that State for that purpose, and their proceedings resulted in the distribution of the fund under the control of the authorities of the State of Virginia, between these parties on the 21st of December, 1880, about one year previous to the appointment of this receiver. An adjustment of the affairs of the company was made in such a manner as to result in the discontinuance of the proceedings taken previous to that time for a dissolution of the corporation and the settlement of its affairs, and

the action in which the receiver was appointed was a distinct and independent proceeding from that, having been commenced after the company had again become insolvent. These policies were presented for allowance to the receiver, and a dividend claimed upon them in the same proportion as should be payable on other demands against the company. But the referee disallowed the claim so far as to deduct from this proportion the amount which had been paid upon these policies under the proceedings in the State of Virginia, and the court affirmed his report so far as it in that manner qualified or reduced the claims of the applicants.

This ruling seems to have proceeded upon the decision made in the case of *Hunt v. The Knickerbocker Life Insurance Company* (101 N. Y., 636), where it was held by the General Term, and affirmed by the Court of Appeals, that the amount in that case obtained by the policyholder under similar proceedings in the State of Virginia, should be deducted from his proportionate amount of the other assets of the corporation. But in that case the proceedings in the State of Virginia, through which the money was realized, were commenced and terminated, after the appointment of the receiver, and resulted in appropriating to the payment of the holder of the policy a part of the assets owned by the company at the time of his appointment, while here the securities, out of which the payments were made upon the Virginia policies, were no part of the assets of the company at the time of its second insolvency or when the receiver was appointed by the court. Before either of these events arose these securities had been disposed of, and the moneys had been applied upon the Virginia policies, and they remained as legal demands against the company for the residue of their amounts at the time the proceedings were instituted in which the receiver was appointed. At that time, consequently, the policies were legal and existing claims against the company for the amounts to which they had in this manner been reduced.

By section 1793 of the Code of Civil Procedure it has been declared that the final judgment for the dissolution of a corporation "must provide for a just and fair distribution of the property of the corporation, and of the proceeds thereof, among its fair and honest creditors, in the order and in the proportions prescribed by law, in case of the voluntary dissolution of a corporation "

When the judgment was obtained in this action the applicants were fair and honest creditors of the corporation for the amounts unpaid upon their respective policies, and by the statute to which reference has been made in this section of the Code, declaring the order in which the debts shall be paid, the receiver has been directed, after the payment of debts entitled to preference under the laws of the United States, and judgments against the corporation to the extent which they shall be liens upon its real estate, to pay "all other creditors of such corporation in proportion to their respective demands," etc. (3 R. S. [7th ed.], 2401, § 79, sub. 3.) And by this direction it became the duty of the receiver to apply the assets or their proceeds remaining in his hands, after the payment of debts entitled to a preference under the laws of the United States, and judgments, so far as they were liens upon the real estate of the corporation, equally among all its other creditors as their demands existed at the time of his appointment.

The provisions of the statute are such as to place the assets of the company in the charge of the receiver for distribution in the manner specified by its directions, and no authority has been given to him, or to the courts regulating his proceedings, by which one class of creditors shall be wholly or partially excluded from their proportionate parts of the assets of the company by reason of previous payments made upon their debts before the appointment of the receiver. Under these provisions, if the company had issued its obligations for a sum of money upon which, in the course of its business, it had made payments, and thereby reduced the amount of the indebtedness, the holder would surely be entitled to have the balance remaining allowed as his debt against the company and to receive his proportionate part of the proceeds of the assets upon the balance. That would be the debt or demand existing against the company, both at the time of its insolvency, and at the time of the appointment of the receiver. But still it would be no more so than was the amounts of these respective policies after deducting what had been received upon them under the proceedings in the State of Virginia. After the amounts had been received the policies still remained demands against the company for the residue, and they were in that condition when the receiver was appointed and the assets of the company passed into his hands. And it

follows, that in the distribution of such assets, there should be paid on the policies the same proportionate amounts as are payable upon all other simple contract debts existing against the corporation at the time of the receiver's appointment. The object of the statute was to place creditors of the same class upon the like footing, entitled to have the assets or their proceeds applicable to their debts, distributed equally among them in proportion to their respective demands. These applicants were entitled to the application of this rule to ascertain the amounts they were respectively entitled to upon their policies, without deducting from these amounts what had been received in the proceedings against the company previous to its final insolvency and the appointment of the receiver of its property.

What the receiver obtained was the property of the company, subject to its debts as they were when he was appointed, and not as they were by transposing preceding dealings down to or subsequent to the time of his appointment. As these policies were legal demands against the company for their balances remaining unpaid and unadjusted when the receiver was appointed, such balances were the demands against the company, and it was upon such demands that the law has provided payments shall be made in proportion to their respective amounts.

The order, therefore, from which the appeal has been taken should be reversed, and an order entered sustaining the exceptions taken to the referee's report, and directing the allowance of the policies for the balances, for which they were valid claims against the company at the time the receiver was appointed, but, as the controversy presents a point not heretofore determined, it should be without costs.

DAVIS, P. J., and BRADY, J., concurred.

Order reversed, without costs.

MATTER OF NEW YORK DISTRICT RAILWAY. 621

FIRST DEPARTMENT, OCTOBER TERM, 1886.

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IN THE MATTER OF THE NEW YORK DISTRICT RAILWAY COMPANY, FOR THE APPOINTMENT OF THREE COMMISSIONERS TO DETERMINE WHETHER ITS RAILROAD OUGHT TO BE ALLOWED TO BE BUILT, ETC.

*When an underground railroad is a street railroad within section 18 of article 3 of the Constitution — chapter 582 of 1880 is unconstitutional as violating this section.*

The petitioner, a corporation duly organized and incorporated under chapter 140 of 1850, to construct, maintain and operate a railroad for public use between certain points in the city of New York, having adopted plans which rendered it necessary to build said route underground, and to run the same by a tunnel underneath the streets, roads and public places of the city, and having made diligent efforts to obtain the consent of the owners of one-half in value of the property bounded on the line of the streets, roads and public places through which it was proposed to construct such railroad, and being unable to obtain the consent of such property owners, applied to the General Term of the Supreme Court to appoint three commissioners who should determine, after a hearing of all parties interested, whether such railroad ought to be allowed to be built underneath said streets, roads and public places, as provided in section 1 of chapter 582 of 1880.

*Held*, that the underground railway, which the petitioner proposed to construct, was "a street railroad," within the meaning of those words as used in section 18 of article 3 of the Constitution of the State of New York, forbidding the passage of any law authorizing the construction and operation of a street railroad, except upon the condition that the consent of the owners of one-half in value of the property bounded on, and of the local authorities having the control of that portion of the street or highway upon which it is proposed to construct and operate it be first obtained, and providing that in case the consent of the property owners cannot be obtained then the determination of the commissioners, to be appointed as therein provided, shall be taken in lieu thereof.

That so much of the first section of chapter 582 of 1880, as provided that "the determination by said commissioners, confirmed by the court, may be taken in lieu of the consent of *said authorities* and property owners," is unconstitutional and void.

That the court could not sever the effect which the act gives to its confirmation of the commissioners decision, holding the confirmation effective as a substitute for the consent of the property owners and ineffective as a substitute for the consent of the city authorities.

That the application for their appointment should, therefore, be denied, as legal machinery should not be set in motion to bring about a result forbidden by the organic law.

MOTION, on the part of the corporation above named, for the appointment of three commissioners to determine whether it should be allowed to build its railroad.

The petition of the New York District Railway Company alleged that the petitioner was a corporation duly organized and incorporated under, pursuant to and in conformity with an act of the legislature of the State of New York, passed April 2, 1850, entitled "An act to authorize the formation of railroad corporations and to regulate the same," and all the several acts of said legislature supplementary thereto and amendatory thereof; that it was so organized and incorporated to construct, maintain and operate a railroad for public use in the conveyance of persons and property, between certain points in the city of New York, to wit: Beginning on Broadway; \* \* \* that according to the route and plans adopted by such petitioner for the building of its said railroad, it is necessary to build said road under ground, and to run the same by tunnel underneath the streets, roads and public places above named, and that said petitioner intends so to build the same, and at all times to keep the same in such condition as to make the surface of the ground above said road, and in the neighborhood thereof, firm and safe for buildings and other erections thereon, and, in case surface excavations are made, that as soon as can be done, the surface shall be restored to its former condition, except so far as may be actually required for ventilation of the tunnel beneath the same or for access thereto; that under the provisions of the act of the legislature of the State of New York, passed June 25, 1880, entitled "An act to provide for excavating and tunneling and bridging for transportation purposes within villages and cities of this State," it is necessary that said petitioner, before building its said railroad, shall obtain the consent of the owners of one-half in value of the property bounded on the line and of the proper authorities having control of the streets, roads and public places aforesaid; or, in case such consent of the owners of property bounded on the line cannot be obtained, the General Term of this honorable court may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether said petitioner's said railroad ought to be allowed to be built underneath said streets, roads and public places, or any of them, and in what manner the same may



## MATTER OF NEW YORK DISTRICT RAILWAY. 623

FIRST DEPARTMENT, OCTOBER TERM, 1886.

be so built with the least damage to the surface and to the use of the surface by the public; and the determination by said commissioners, confirmed by this honorable court, may be taken in lieu of the consent of said authorities and property owners; that said petitioner has made diligent efforts to obtain such consent of owners as aforesaid, but has been unable to obtain, and has failed to obtain, such consent, and that such consent cannot be obtained because of the refusal of the owners of more than one-half in value of the property bounded on the main line of said petitioner's said railroad to consent thereto, as appears by the several affidavits \* \* \* all hereto annexed and made part of this petition.

Wherefore, said petitioner prayed that this court will appoint three commissioners to determine, after a hearing of all parties interested, whether said petitioner's railroad ought to be allowed to be built underneath the streets, roads and public places aforesaid, or any of them, and in what manner the same may be so built with the least damage to the surface and to the use of the surface by the public; and further and after like hearing, and after duly considering and making allowance for all advantages to accrue to the city of New York from the complete readjustment and improved arrangement of all sewerage, water and other conduits, pipes and conductors, laid or to be laid underneath the streets, roads and public places aforesaid, and of the means of access thereto, to report their conclusions as to what security, if any, should be given, and what compensation, if any, should be made to said city of New York by said petitioner, if allowed to build its said railroad, and as to when and in what manner such compensation, if any, should be paid, and that said petitioner may have such other or further relief, or both, in the premises as may be just.

*Grosvenor P. Lowery and Charles Francis Stone*, for the motion.

*Robert Sewell and Charles P. Daly*, for the New York Arcade Railway Company.

*Thomas P. Wickes*, for the city of New York.

*Horace Russell and Jabish Holmes, Jr.*, for Henry Hilton and other opposing property owners.

*Henry D. Sedgwick*, for the New York Underground Railway Company.

*O. Vandenburg*, for the Broadway Underground Connecting Railway Company, opposed.

BARRETT, J. :

The main question presented by this application is whether an underground railroad, such as that which the petitioner contemplates constructing under what is commonly called the tunneling act of 1880 (chap. 582), is a street railroad within the meaning of article 3, section 18 of the Constitution. If it is, then the petitioner concedes that that part of section 1 of the act of 1880, which substitutes the favorable determination of commissioners, when confirmed by the General Term, for the consent of both the local authorities and property owners, is unconstitutional; that is, unless the provision can be severed and the substitute confined to the consent of the property owners. If unconstitutional, the application, being within the exception suggested in the *Thirty-fourth Street Case* (102 N. Y., 343), should be denied, for certainly legal machinery should not be set in motion to bring about a result forbidden by the organic law.

The question has been very ably and exhaustively treated by the learned counsel for the petitioner, and I confess that his argument has induced me to subject my first impression to rigid analysis. After full consideration, however, I am satisfied that a broader view should be taken of the amendment of 1874 than is thus contended for, and that it was never intended to limit the wholesome provisions of article 3, section 18, to surface and elevated railroads. Underground railroads in cities are quite as gigantic enterprises, and involve as valuable franchises and as important public and private interests as any surface or elevated railroad. The mischiefs aimed at by the amendment apply with equal, and in some respects with greater force to underground railroads. The local authorities have a greater interest in the sewerage, water and gas systems beneath the surface than in anything upon the surface likely to be affected by a railroad. The property owners upon the line have also a deep interest in the protection of their vaults, the security of their buildings, the safety of the street surface and in

the methods to be adopted for ventilating the tunnels. The latter question is especially important in a case where, as authorized by this act (sec. 1), surface openings are adopted and the ordinary street use is correspondingly limited. And why is not an underground railroad a street railroad within both the letter and the spirit of the Constitution? The petitioner says because it is not within the popular conception of the term, nor within the conception of the term drawn from legislative or official action. But the popular conception of a street railroad, and the intention with which the amendment was framed and voted for, are entirely different things. The same rules of construction which are applicable to statutes govern in constitutional interpretation. The intent is to prevail over the literal meaning of words. The general purpose of the constitutional amendment, the evils which existed and the remedy which was sought, are all to be considered. (*People ex rel. Jackson v. Potter*, 47 N. Y., 375.) Now, it would be not only a narrow construction, but a very loose, uncertain and varying one, which would limit the phrase "street railroad," as embodied in this amendment, to what the petitioner terms "the image responsive to the phrase," which each voter must have had in his mind. The intention could not have been thus to impair the usefulness of the measure, nor to limit its beneficent operation by a literal definition of the term "street railroad." It was, rather, within any fair view of the entire subject, to embrace every kind of street railroad, surface, elevated or underground, in the existence or non-existence of which the local authorities and the property owners might have an interest. It contemplated not only such structures and systems as had been or were then in existence, but such, also, as the future of science and enterprise might call into existence, however novel and however foreign to the present conception of the voter.

Looked at accurately and free from the confusion of popular phraseology, an underground railroad is not beneath the street. It is beneath the surface of the street, but it is *upon the street*. Any depression from the surface would be equally within the reasoning that a railroad which does not rest upon the surface is not a street railroad. Whether the cut be of six inches or of six feet, whether open or closed, whether tunneled by the entire

or partial retention of the surface as a vaulted ceiling, would only raise a question of degree.

It is true that in the illustration of an open cut there would be a loss to the people of the ordinary surface use, but the illustration serves when we are, in substance, asked to interpolate in the amendment, after the term street railroad, the words "resting on the surface of the street." There is therefore nothing, in my judgment, in the argument from popular conception, which militates against the view that all structures making use of, or resting anywhere upon the street, from the surface downward, are within the constitutional provision.

But little light is thrown upon the question by the historical reference to which our attention has been called. If the solution depended upon the phraseology of past legislation, we should say that the references, which the industry of counsel has placed before us, about balance each other. But the present question is not concluded by phrases in legislative acts and official reports, any more than it is by popular images responsive to the term "street railroad." It is, indeed, of very little consequence whether the legislature, in speaking of street railroads, uses the words "in the street" or the words "upon the street." We find the words "in," "through," "along" and "upon" running almost equivalently through past legislation.

It is also natural to find existing structures classified in particular language. But it by no means follows that it was intended to limit the operation of the amendment to structures covered by such classification. What is more important than these legislative definitions, as bearing upon the present question, is the course of legislative action with regard to the consent of the local authorities and the property owners. It was to fix these vital rights, sometimes conceded and sometimes denied, to place them beyond the power of legislative infringement that the people acted. It may safely be asserted that these were the "images" which the voters had in their minds, rather than any particular motive power or style of railroad structure, or system of transportation. It was the great principle of restricting corporate aggression and expanding popular rights that was voted for and adopted. Limitation of the subjects upon which such great and wholesome principles were to operate

would have been wholly inconsistent, under all the circumstances, with the declaration of the principles themselves.

The doctrine of legislative exposition is also invoked by the petitioner. This is a doctrine peculiarly applicable to cases of doubt (which we do not find here), and one which should certainly not be expanded to the extent of practically clothing the legislature with judicial functions. Where the legislation is almost contemporaneous with the Constitutional provision, it is, of course, entitled to greater weight than an act passed, as was that under consideration five years later. Indeed, the only act which comes within the contemporaneous principle is the rapid transit act of 1875, and there underground roads, as well as elevated and surface roads, are treated as within the constitutional amendment in question. It is fair to assume that the legislature, when thus considering the great rapid transit scheme, with the amendment just adopted before it, required the same conditions to be performed by all railroads, whether above, upon or beneath the surface, because, in its judgment, the Constitution required all such railroads to be treated alike.

Having thus concluded that the act of 1880, in the particulars discussed, is unconstitutional, I do not think that the petitioner's case is within the principle that when part of an act is constitutional and part unconstitutional, that part which is valid should be upheld, provided it is separable from that which is invalid. This principle would enable the petitioner to proceed under the act up to the point where an application for the appointment of commissioners is essential. It may obtain the consent of the local authorities and of the requisite number of property owners. These provisions are valid and separable from what follows. But when an application for the appointment of commissioners becomes necessary, the petitioner must take the provision on that head as it is. The court cannot sever the effect which the act gives to the confirmation of the commissioners' judgment. We cannot say that there shall be a constitutional effect when the act declares that there shall be an unconstitutional one. This question is not affected by the petitioner's present disclaimer. The act does not substitute the confirmation of the commissioners' judgment for the consent either of the local authorities or of the property owners, but for that of both. The court cannot be asked to produce this result merely

because the petitioner protests that it will not insist upon the unconstitutional half, especially as the petitioner by no means concedes the unconstitutionality of this half, but, on the contrary, in contending that its railroad is not a street railroad at all, within the amendment, necessarily assumes the position that the legislature was not constitutionally bound to require either the consent of the local authorities or of the property owners, or any judicial substitute for the latter. In other words, that as to underground railroads in cities, the people are as completely at the mercy of the legislature (except as to special legislation) as they were before the constitutional amendment was adopted.

For these reasons I am of opinion that the application for the appointment of commissioners should be denied.

BRADY, J., concurred.

Motion for the appointment of commissioners denied.

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HUGH N. CAMP, AS TEMPORARY ADMINISTRATOR OF THE  
ESTATE OF OWEN GEOGHEGAN, DECEASED, APPELLANT,  
v. JEREMIAH A. HALLANAN, RESPONDENT.

*Statute of limitations — when a judgment of the New York Marine Court is deemed to be a judgment of a court of record, although the court was not a court of record at the time of its entry.*

On December 6, 1863, a judgment was recovered against the defendant in this action in the Marine Court of the city of New York. At that time that court was not, except in a limited sense and for certain purposes, a court of record, but it was, by chapter 629 of 1873, made a court of record to and for all intents and purposes.

*Held*, that the judgment was that of a court of record, which would not be presumed to have been paid until after the expiration of twenty years from the time of its recovery.

APPEAL from an order, made at a Special Term, denying a motion for a temporary injunction.

N. J. Waterbury, Jr., for the appellant.

Henry F. Lippold, for the respondent.

BRADY, J. :

The object of this action was to prevent the enforcement of a judgment, existing unsatisfied against the defendant, upon the ground that it had lost all vitality under the statute of limitations. It was recovered in the Marine Court of this city, which, at the time (December 6, 1868), was not a court of record, except in a limited sense and for certain purposes ; but in 1872, by chapter 629 of the Laws of that year, it was made a court of record, to and for all intents and purposes, and its jurisdiction enlarged.

It is conceded that when the judgment was perfected, under the Code then prevailing, the period limited for the commencement of an action upon it was twenty years (Code of Pro., § 90; *Conger v. Vandewater*, 1 Abb. [N. S.], 126; *Delavan v. Florence*, 4 Abb., 277, note); but it is supposed by the appellant that the Code of Civil Procedure, adopted in 1876, by section 382 supplanted section 90 of the old Code and shortened the period of twenty to six years.

The Marine Court, as we have seen, had at that time been declared to be a court of record to and for all intents and purposes, and section 382, subdivision 7, must therefore be considered with reference to any and all provisions in the Code bearing upon that subject. The provision of section 382, so far as it applies to this case, is that an action must be commenced within six years "upon a judgment or decree rendered in a court not a court of record." But this must be taken in conjunction with section 2 of the same Code as suggested and in which the Marine Court is enumerated as one of the courts of record of the State. And thus the period of limitation within which the judgments of that court lived, for the purposes of an action was continued and preserved by express terms, the same as before its passage.

There can be no doubt of the right of the legislature thus to declare the law. (*Acker v. Acker*, 81 N. Y., 143.) This question, it should be observed, is not effected in any way, therefore, by the omission in the statute of 1872 (*supra*) of language showing an intention to give it a retroactive effect, or of express words constituting the Marine Court a court of record as to judgments then existing, inasmuch as the Code of 1876 was passed when the court was not only a court of record but recognized as such therein, and the legislature had the right to change or continue the statute of

limitations, relating to it if necessary or expedient. Such a procedure affects the remedy but does not impair the obligation of contracts. (*Acker v. Acker, supra.*)

This question has been passed upon by the General Term of the Marine Court, and a similar conclusion expressed by McADAM, J., We are not advised of the views entertained by the learned justice presiding in the court below, but we assume that he arrived at the same result from the same mode of reasoning.

We think the order appealed from should be affirmed, with ten dollars costs and disbursements.

DAVIS, P. J., and DANIELS, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

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PHINNEY AYRES AND SAMUEL E. AYRES, APPELLANTS,  
v. SARAH J. DOYING, RESPONDENT.

*Diversion of a promissory note from the use to which it was to have been applied — when that fact may be set up by the maker as a defense to an action brought by a transferee of the note, receiving the same as collateral to a pre-existing indebtedness.*

In this action brought upon a promissory note given by the defendant to one John D. Taylor, and transferred to the plaintiffs before maturity, the defendant set up, as a separate defense, that Taylor being indebted to one Shaw in the sum of \$150 for services rendered, in obtaining the contract for the doing of the work which furnished the consideration of the note, applied to the defendant before the last payment was due for notes amounting to \$250; that the defendant had agreed to satisfy and pay the claim of Shaw out of the proceeds of the last payment, and she refused to give the notes; that then Taylor promised that if two notes, one for \$100 and the other for \$150 were given, he would deliver the \$150 note to Shaw in payment; that thereupon the \$150 note was made and delivered; that Taylor diverted this \$150 note from the purpose for which it was made; that no consideration or value was given for the note by the plaintiffs, who received the same as collateral and in consideration of an antecedent indebtedness of Taylor to them.

*Held*, that the facts so set up established a defense, and that a demurrer interposed thereto by the plaintiffs was properly overruled.

APPEAL from a judgment overruling a demurrer interposed to the second defense set up in the defendant's answer.



*James B. Lockwood*, for the appellants.

*John C. Shaw*, for the respondent.

BRADY, J.:

This action was predicated of a promissory note given by the defendant to one John D. Taylor and transferred before maturity for a valuable consideration.

It is alleged in the complaint that the defendant gave the note to John D. Taylor in payment for work and labor performed and materials furnished by him to her, and which allegation is admitted.

The defendant, however, for a separate defense, set up that Taylor was indebted to John C. Shaw in the sum of \$150 for services rendered in obtaining for him the contract for the work done, and which sum was to be paid out of the last payment for the work performed and materials furnished and supplied by Taylor at the request of and upon the houses belonging to the defendant; and that thereafter, and before the last payment became due, which was to be made to Taylor under the contract, he applied to the defendant for notes aggregating the sum of \$250; that the defendant refused to give him the notes, as she had agreed, in consideration of his promise, to satisfy and pay the claim of Shaw out of the proceeds of the last payment, and that thereupon Taylor promised that, if the notes were made out and divided in amounts, that is, one for \$150, he would deliver it to Shaw in payment, and that thereupon and upon his express agreement that the note of \$150 would be delivered to Shaw in payment of his claim against Taylor, the defendant made and delivered the note for that amount mentioned in the complaint; that Taylor unlawfully and wrongfully failed to deliver that note to Shaw, but diverted the same from the purpose for which it was made and delivered, and finally, the defendant, upon information and belief, charged that no consideration or value was given for the note by the plaintiffs, who received the same as collateral and in consideration of an antecedent indebtedness of Taylor to them.

The learned justice in the court below held the defense set up a good one and in this view we concur. In the case of the *Grocers' Bank v. Penfield* (69 N. Y., 502) it was held after a full examination of the authorities, it is true, that where a promissory note

was made for the accommodation of the payee, but without restriction as to its use, an indorsee taking it as collateral security for the antecedent debt of the indorser, without other consideration, but in good faith and before dishonor, occupied the position of a holder for value. But, at the same time, the court declared it to be undoubtedly the rule, that where the note was diverted from the purpose for which it was entrusted to the payee and some other equity existed in favor of the maker, it was necessary that the holder should have parted with value on the faith of the note in order to cut off the equity. (See *Pool v. Watson*, 50 Supr. Ct., 53; *Continental National Bank v. Townsend*, 87 N. Y., 8, 10.)

The rule, applicable to the defense set up herein by the defendant, is well stated in *Tinsdale v. Murray* (9 Daly, 449), in which it is said that it was always competent for the maker to fix the condition upon which the note shall be transferred, and to prohibit its transfer unless that condition be complied with; and further, that one who takes a note, the use of which is restricted, as collateral security for an antecedent debt, cannot recover upon it.

The learned counsel for the plaintiffs thinks that whatever happened between Shaw and Taylor is *res inter alios acta* and did not concern the defendant, and that there was no obligation on her part to pay Shaw anything; and the case of *Wheeler v. Allen* (59 How., 118) is cited as demonstrating the instability of the defense which has just been considered. But in that case, although it was held that if an indorser had no interest in the way in which the proceeds of a note were to be used, it was no defense to him that he was told the note was to be discounted at a bank, though it was in fact the intention of the maker, whom he accommodated, to use the note to pay an antecedent debt, and though the note be so used. It was nevertheless said that there was nothing in the case to show a misappropriation of the note.

Assuming the doctrines of that case to be perfectly well settled, it has no application to the facts developed. If the defendant chose, as she has done, to protect a creditor of her contractor, and he assented to the arrangement by which such protection was accomplished, the agreement between them is controlling, and any departure from it must be governed by the rules of law which may be invoked under the circumstances. She had a perfect right to

FIRST DEPARTMENT, OCTOBER TERM, 1886.

say: "I will give you a note for a hundred and fifty dollars, but it is upon the express understanding that it shall be delivered to one of your creditors, whose claim grew out of the contract between you and me." Of course, he might have declined to accept a note under the circumstances, and to have prosecuted his claim, if he had one, against her. But having submitted to the condition imposed, it is binding upon him and upon his creditor, who accepted a note thus restricted and diverted only as collateral to and in settlement of an antecedent debt.

For these reasons the judgment should be affirmed, with costs.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed, with costs.

MARY MACKAY GREENWOOD, PLAINTIFF, v. EDMUND F. HOLBROOK AND FREDERICK W. FOOTE, EXECUTORS OF WILLIAM W. WRIGHT, DECEASED, AND OTHERS, DEFENDANTS.

*Construction of an agreement—when the words "legal representatives" means executors and administrators, and not next of kin.*

John Greenwood died in May, 1865, having by his will devised substantially all his estate to his widow during her life, with remainder to his four children on her death; opposition was made to the probate of the will, which was abandoned upon the widow's entering into an agreement by which she was to pay, during her life, one-eighth of the net income to each of the four children, and in case of the death of either of said children during her life, she was to pay the one-eighth part of said income, so "agreed to be paid to the child so dying, to his or her legal representatives," so long as the said covenants and agreements should be observed and performed.

One of the daughters died childless in 1880, leaving a will by which she gave all her estate to her husband, stating therein that she intended to include all interests acquired and to be acquired by her from the estate of her father. The husband died in 1884, leaving a will, of which the defendants, Holbrook and Foote, were appointed executors.

*Held*, that the words "legal representatives" meant executors and administrators, and not next of kin, and that the one eighth of the income, to which the daughter so dying was entitled, should be paid to the executors of the husband, and not to the brothers and sisters, or their issue, of the daughter so dying.

APPEAL from a judgment, entered upon the trial of this action at a Special Term.

The action was to obtain a construction of certain portions of an agreement made between the plaintiff, the widow of one Isaac John Greenwood, and his children.

*Stephen P. Nash*, for Holbrook and Foote, defendants, appellants.

*C. A. Hand*, for Isaac J. Greenwood, defendant, respondent.

BRADY, J. :

It appears from the record in this case that John Greenwood died May 14, 1865, leaving a widow, the plaintiff, and four children. By his will he substantially devised all his estate to his widow during life or widowhood, his children, under the will, taking the estate given them subject to this life estate. Opposition to the probate of the will having been made, an agreement was entered into, by which it was to be abandoned upon the widow's paying one-half of the net income to the children during her life, that is, one-eighth to each of the four children. Eliza Jane Wright, one of the children, died childless on the 18th of April, 1880, leaving a will by which she devised and bequeathed to her husband all her estate. The will contained the following clause : " And I intend to include in this devise and bequest all interests acquired, and to be acquired by me from the estate of my late father." Her husband died in 1884, leaving a will by which the defendants, Holbrook and Foote, were made executors, and who claimed that their testator, under the will of his wife, and the agreement already mentioned, acquired the right to one-eighth of the income of the estate for the rest of the life or widowhood of the plaintiff. The learned court below sustained this claim. The appellants, however, insist that after the death of Mrs. Wright the interest acquired by the agreement went to her next of kin. The clause of the agreement upon which the controversy herein arises is as follows : " And it is hereby further agreed that in case of the death of either of the said four children, during the widowhood of the said party of the first part, she will pay the one-eighth part of said income hereby agreed to be paid to the child so dying, to his or her *legal representatives*, so long as the said covenants and agreements shall be observed, performed and fulfilled as above mentioned."

The learned justice in the court below thought that the phrase legal representatives contained in the clause means executors or administrators, that being the ordinary signification of the term where reference was made to personal estate only, and he said that a careful consideration of the circumstances under which the agreement was made had led him to the conclusion that the words in question were meant to have the ordinary meaning.

The agreement, as conceded by the learned counsel for the appellant, was equivalent to an assignment to each of the children of one-eighth of the life estate which could have been disposed of by the owner and would, of course, pass under her will. It was, as he correctly observes, a vested interest *pour autre vie*; but while the respondent contends that the clause embracing the words "his or her legal representatives" was inserted for more abundant caution to confirm this view, he insists, on behalf of his client, that the effect of it was to limit the interest granted by providing what should become of it if either of the children should die before their mother, in which case she agreed to pay the income, not to the executor or administrator, which would have been the proper phrase to use if it had been intended to confirm and carry out the view just suggested, but to "his or her legal representatives," that is, to his or her brothers and sisters, or their issue and next of kin. And the learned counsel proceeds in his brief to cite a number of cases in which the words "legal representatives" were held to mean next of kin. Assuming that what these words mean must be determined by the mode and connection in which they are used, the mode and connection in which they are used in this case makes it apparent that the interest being an absolute undertaking to pay a certain sum, thus creating an absolute right to receive and transfer it, authorized and legalized the disposition of it by will to any person or persons whom the testator thought proper to name; and this absolute right cannot be interfered with by any interpretation hostile to that view. Where the object and design of an agreement, as understood by both parties, is to change the ordinary signification of a phrase, there should be something in the instrument itself, if there exists no proof which could be given *aliunde*, to show such object and design. From the will of Mrs. Wright, however, it conclusively appears that she regarded the agreement as one conferring upon her an absolute

FIRST DEPARTMENT, OCTOBER TERM, 1886.

right to receive one-eighth of the income, and the right of disposition in any manner that she thought proper, regarding it as part of her father's estate, to which, though she was not entitled by the express clauses of the will, she acquired title by compromise and was thus enjoying and disposing of her own property.

For these reasons, without any extended examination of the cases bearing upon the subject which may be regarded as somewhat numerous and might lead to confusion, it is thought that the learned judge in the court below was right, and that the judgment should be affirmed.

DANIELS and CHURCHILL, JJ., concurred.

Judgment affirmed.

NICHOLAS KILROY, APPELLANT, v. WILMER S. WOOD,  
INDIVIDUALLY AND WITH OTHERS, TRUSTEES UNDER WILL OF  
SILAS WOOD, DECEASED, RESPONDENTS.

*Action to reach the surplus income of a trust fund—the habits and ability of the cestui que trust are to be considered in determining the amount to be allowed to him for his maintenance—the plaintiff must prove that there is a surplus.*

Where a judgment creditor seeks to compel so much of the income of a *cestui que trust*, as exceeds what is necessary for his suitable support and maintenance, to be applied to the payment of his debt, the court in determining what is a proper amount to be allowed for the expenditures of the *cestui que trust*, will consider the manner in which he has been brought up, the habits acquired by him, and his ability to take care of his property.

To entitle the plaintiff to succeed in such an action he must prove that there is a surplus of income, and where he fails so to do his complaint will be dismissed.

APPEAL from a judgment at a Special Term, dismissing the complaint upon the merits.

P. & D. Mitchell, for the appellant.

F. B. Candler and M. L. Erlanger, for the respondents.

BRADY, J. :

This action was commenced for the purpose of reaching certain alleged accumulations of income, constituting a surplus over and

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above the amount which should be allowed to the beneficiary, Wilmer S. Wood, for his necessary expenditures. He was the beneficiary under a clause in the will of his father, which provided for the appropriation of a part of the income of his estate, without the power of anticipation of any surplus of income until he should attain full age, when the trustees were authorized to advance such accumulations or to keep them invested or give them to him from time to time, as they thought best.

The evidence establishes that the beneficiary is in receipt of a handsome income, which the learned justice in the court below thought was not more than sufficient to support him in the manner in which he had been accustomed to live, and was not beyond what his father intended to provide for him.

It has been held, in a series of cases, that a judgment creditor is entitled to the appropriation of the income beyond what is necessary for the suitable support and maintenance of the *cestui que trust* and those dependent upon him. (Code Civil Pro., §§ 1871 to 1879; *Williams v. Thorn*, 70 N. Y., 270; *Graff v. Bonnett*, 31 id., 9; *Craig v. Hone*, 2 Edw. Ch., 376 and 554; *Tolles v. Wood*, 99 N. Y., 616; *Sillick v. Mason*, 2 Barb. Ch., 79.) And in determining what is a proper amount to be allowed for his expenditures, it seems to be regarded as proper to consider the manner in which he has been brought up, the habits acquired by him, and his ability to take care of his property. It was said in the case of *Sillick v. Mason* (*supra*): "It certainly was the misfortune of the defendant that he was brought up in idleness, under the idea that he was to inherit a large estate, and that it was unnecessary that he should acquire any business habits, so as to fit him to acquire property or to enable him to take care of it if given to him by others." And in the same case the chancellor, after determining the amount which should be allowed the beneficiary, said: "And they should not, upon a fair construction of the statute on this subject, be permitted to indulge in extravagant expenditures whilst the defendants' creditors remained unpaid."

The same observation applies in this case. But the difficulty in disturbing the judgment arises from the fact that there is not sufficient evidence to show, indeed it may be said that there is no evidence on the part of the plaintiff tending to show, what would be

a proper amount to allow the beneficiary for his support. He is, as claimed in the defendants' points, a gentleman of high social standing, whose associations are chiefly with men of leisure, and is connected with a number of clubs, with the usages and customs of which he seems to be in harmony both in practice and expenditure, and it is insisted on his behalf that his income is not more than sufficient to maintain his position according to his education, habits and associations. And this may be so, yet it would seem that evidence might have been adduced which would establish his ability to live upon a smaller sum than the whole income, and thus relieve himself from the burden of a debt which seems to have been justly contracted. But the evidence is wholly insufficient on this subject on behalf of the plaintiff.

In the case of *Sillick v. Mason (supra)*, a reference was made to a master to ascertain and report what would be a reasonable amount of the income for the support of the defendant and his family.

It was the duty of the plaintiff to show, in order to succeed, that there was a surplus of income, and which, as already suggested, he has failed to do.

An examination has been made of the exceptions presented upon the record, and it has been found that none of them is sufficient to change the result which must be declared, the inherent difficulty in the plaintiff's case being, as already suggested, the failure to show, by proper and sufficient evidence, that there was a surplus of income.

For these reasons the judgment must be affirmed.

DAVIS, P. J., concurred.

Judgment affirmed.

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JOHN I. TILTON, APPELLANT, v. SUSAN M. VAIL AND  
OTHERS, RESPONDENTS.

*Action for partition — a tenant by the courtesy, of an undivided share, may maintain it — Code of Civil Procedure, sec. 1582.*

In January, 1871, one Vail died seized of certain real estate, leaving him surviving his widow, a son and two daughters. In December, 1881, one of the daughters intermarried with the plaintiff. On June 30, 1884, she gave



birth to a male child, who lived only for a day, and on July eighth she died intestate, leaving her mother, sister, brother and the plaintiff her surviving.

*Held*, that the real estate was held by the plaintiff and the widow and surviving children of Vail as tenants in common, and that the plaintiff was entitled to maintain an action for the partition of the property under the provisions of section 1582 of the Code of Civil Procedure.

APPEAL from an order denying a motion for a reference to take proof of title.

*William C. Beecher*, for the appellant.

*Alexander Thain*, for the respondents.

BRADY, J. :

This action was brought for the partition of real estate situate in this city. Joshua R. Vail died seized of the premises in January, 1871, leaving him surviving his widow, Susan M. Vail, his son, John R. Vail, and his daughters, Adelina M. Vail and Lilla B. Vail. Lilla, on the 15th of December, 1881, intermarried with the plaintiff. On the 30th of June, 1884, she gave birth to a male child, who lived only for a day, and she died, upon the eighth of July following, intestate, leaving her mother, sister, brother and the plaintiff surviving.

The complaint avers that the plaintiff and defendant are tenants in common in possession, which is admitted, and it is also admitted that the former is entitled to an estate in the premises as tenant by the curtesy in the undivided one-third part which his wife, Lilla B. Tilton, took, subject to the dower right of the defendant, Susan M. Vail, and incumbrances, if any. But the defendants by answer, although admitting the facts which have been stated, still, upon information and belief, claim that the plaintiff has no such interest in the premises as entitles him to maintain the action. And this view was sustained by the learned justice to whom application was made for an order of reference to take proof of title, and who denied it upon the ground that the plaintiff could not maintain the action, and which is stated without elaboration by the learned justice.

Prior to the enactment of the Code of Procedure it was declared in a series of cases that a tenant by the curtesy could maintain an action for partition. (*Riker v. Darke*, 4 Edw. Ch., 668; *Sears v.*

*Ilyer*, 1 Paige, 483, 486; Freeman on Cotenancy and Partition, § 456; 5 Wait's Prac., 30.) The Code, by section 1532, provides that: "Where two or more persons hold and are in possession of real property, as joint tenants or as tenants in common, in which either of them has an estate of inheritance or for life or for years, any one or more of them may maintain an action for the partition of the property, according to the respective rights of the persons interested therein." And the proposition is at once suggested that if the plaintiff is a tenant in common in possession, he is within the purview of this statute.

Tenants in common are such as hold by several and distinct titles, but by unity of possession, and, therefore, one may hold his part in fee simple and the other in tail or for life. There is no necessity for unity of interest. (Chase's Blackstone, 368.) Or, to express it differently, tenants in common are such as have a unity of possession, but a distinct and several title to their shares. (Williams on Real Property, 136.) To the same effect see McCall on Real Property. (P. 133, § 21).

The plaintiff, in consequence of his life estate, being a tenant in common, and in possession in common with others, of the premises of which partition is sought under the section just referred to, seems to have an undoubted right to maintain the action. There are other sections of the Code which may be said to bear upon this subject, but it is not necessary to consider them, inasmuch as it might lead to confusion. The section referred to is broad and comprehensive, and seems to be unanswerable.

For these reasons the order appealed from must be reversed, with ten dollars costs and disbursements to abide the event.

DAVIS, P. J., and DANIELS, J., concurred in the result.

Order reversed, with ten dollars costs and disbursements to abide event.

## WILLIAM H. M. SANGER, RESPONDENT, v. JAMES M. SEYMOUR AND OTHERS, APPELLANTS.

*Inspection of books and papers—an order compelling their production will not be granted unless it is needed to enable the party to present his own case.*

This action, brought to recover the amount found to be due to the plaintiff from the defendants on a settlement of the accounts of the parties, was defended upon the ground that the settlement was obtained by fraud, duress and coercion, and the defendants asked that it be set aside.

Upon an appeal from an order granting an application made by the plaintiff for a discovery and inspection of certain books and papers, the defendants claimed that the only question to be tried was whether the defendants gave up certain securities and signed the agreement through fear, duress and fraud practiced on the part of the plaintiff.

*Held*, that as an examination of the pleading, taken in connection with the declaration of the defendants' counsel, made in open court upon the submission of the appeal herein, showed that the plaintiff's claim was proved *prima facie*, and that as it was not necessary for the presentation of his case in the first instance that the plaintiff should be permitted to make any examination, the order should be reversed.

APPEAL from an order directing an inspection of the defendants' books of accounts.

*Joseph H. Choate*, for the appellants.

*B. F. Watson*, for the respondent.

BRADY, J.:

The parties to this action, having had a variety of transactions involving loans and purchases and sales of stock, finally and on the 26th of March, 1885, as alleged by the plaintiff, settled their accounts, and by mutual agreement in writing; the defendants yielding certain securities to the plaintiff and conceding that they were indebted to the plaintiff in the sum of \$7,500. The facts are very much involved and are somewhat striking in character. For the purposes of this appeal, however, it is not necessary to refer to them in detail.

The defense is that the settlement, at the time mentioned, which resulted in an agreement creating the indebtedness already stated, was obtained by fraud, duress and coercion, and the defendants asked that it be set aside.

The plaintiff applied for a discovery and inspection of certain books and papers, which was granted, and hence this appeal. The defendants take the broad ground in opposition that the sole issue here is whether the plaintiff's case is a blackmailing scheme or not, and that the question to be tried, therefore, is whether the defendants gave up the securities and signed the agreement mentioned through fear, duress and fraud practiced on the part of the plaintiff.

It is not necessary, therefore, in order to establish the plaintiff's case, that there should be any inspection of the books and papers. This concession on the part of the defendants settles all controversy about it, inasmuch as it is thus admitted that if it be not established that the agreement was obtained by fear, duress and fraud, judgment for the plaintiff must follow. The only object, under such circumstances, which can be contemplated by the plaintiff in seeking a discovery, is to prepare to meet the defense stated, and which may or may not be proved absolutely or apparently. From the facts and circumstances spread upon the record it would appear to be impossible for the defendants to maintain their defense, without going into proof of the transactions which characterized the dealings with the plaintiff, and involving, to a certain extent at least, the books used by the defendants in conducting their business, and which, if such a necessity should exist, would expose them to the examination of the plaintiff as well.

It is not usual to direct a discovery and inspection of books and papers in anticipation of a defense and with a view to prepare to meet it. The rule, as generally stated, is that the objects to be inspected must relate to the maintenance of the position taken by the applicant and not that of the opposite party. (*Andrews v. Townshend*, 14 Weekly Dig., 243.) And again, that a discovery will not be granted unless the court is satisfied that the discovery is pertinent and material to the claim or defense of the party seeking the remedy. (2 Wait's Pr., 531, and cases cited.) And, consequently, where the plaintiff moved for an inspection of the defendants' books, to show payment or non-payment of a debt, it was held that the defense of payment is a fact to be shown by the defendant, and not by the party applying for the inspection. (*Cutter v. Poole*, 54 How., 311.)

The result of an examination of the pleadings, taken in con-

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FIRST DEPARTMENT, OCTOBER TERM, 1886.

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nection with the declarations made in open court upon the submission of the appeal herein, is that the plaintiff's claim is proved *prima facie*, and that the defendants have the affirmative of the issue of fraud. In other words, they admit that the agreement alleged was made in March, 1885, as already indicated, and that they are liable under it unless they can show that it was obtained by fear, duress, coercion and fraud, and for which they assail it. It is not necessary, therefore, for the plaintiff's presentation of his case in the first instance, to make any examination of the books and papers in the defendant's possession, inasmuch as the claim is admitted and can only be destroyed by the affirmative defense set up. If that fail, he is entitled to judgment. And it seems to be quite evident that if the defendants should establish the defense by proof of the acts charged, and the books and papers were not necessarily involved in it, they could be obtained by a subpoena *duces tecum*. And when that can be accomplished, it is not usual, and will not, except in extreme cases, be so ordered, to require the party to make the discovery and inspection sought.

For these reasons, the order appealed from should be reversed.

DAVIS, P. J., and DANIELS, J., concurred.

Order reversed.

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JULIUS FORSTMAN, PLAINTIFF, v. RUTH A. SCHULTING,  
EXECUTOR, ETC., DEFENDANT.

*Practice—enforcement of a direction in an order requiring costs or money to be paid to any person — the remedy is by execution and not by attachment — Code of Civil Procedure, sec. 779.*

The defendant's attorney having refused to pay over money received by him as the costs of opposing a motion for a new trial, after he had been duly served with a copy of an order of an appellate court, deciding that the costs should not have been allowed to him, and ordering him to pay the money to the plaintiff or his attorney, a motion was made that an attachment issue against him, to punish him for his failure to comply with the order.

*Held*, that the plaintiff had mistaken his remedy; that he should have proceeded, under section 779 of the Code of Civil Procedure, which provides that, if any sum of money, directed by an order to be paid, is not paid within the time fixed for that purpose by the order; or, if no time is so fixed, within ten days

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FIRST DEPARTMENT, OCTOBER TERM 1886.

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after the service of a copy of the order, an execution against the personal property only of the party required to pay over the money may be issued by any party or person to whom the money is made payable by the order.

MOTION for an attachment, to issue against the defendant's attorney, because of his refusal to pay over to the plaintiff or his attorney certain costs received by him, as required by an order of the court.

*William Watson*, for the plaintiff.

*C. Bainbridge Smith*, for the defendant.

DANIELS, J. :

The application is made on behalf of the plaintiff to punish the defendant's attorney for refusing to pay over money received by him as the costs of opposing a motion for a new trial, which, it was held, by a modification of the order on appeal, should not have been allowed and the attorney has been ordered to pay over to the plaintiff, or his attorney, the amount of costs so received by him, which was ascertained and declared in the order. He has failed to make such payment after the service of a copy of the order upon him, the original, certified by the clerk, being at the same time exhibited, and for that failure it is insisted, on behalf of the plaintiff, that he may be punished for a contempt.

That the order was right directing the restitution of the money so received, follows from section 1323 of the Code of Civil Procedure, for that has prescribed where an order is modified upon appeal, the appellate court or General Term of the same court, as the case may be, may make or compel restitution of property, or of a right lost by means of the erroneous order, and the plaintiff was so deprived of the amount directed to be paid by the order in consequence of an erroneous determination as to the amount of costs which the defendant's attorney was entitled to receive upon the denial of the motion for the new trial. But while the plaintiff is entitled to this restitution, it has not been provided that the attorney or party failing to make it shall be punished for such failure, by way of proceedings for a contempt. It has been provided, on the contrary, by section 16 of the Code, that a party shall not be arrested or imprisoned for disobedience to a judgment or order requiring the payment of money due upon a contract, express or

implied, except where it is otherwise specially prescribed by law. There is no special provision of law subjecting a party or an attorney to arrest or imprisonment for the non-payment of money under these circumstances, and, as the obligation to pay is one that is derived by implication of law, it is upon a contract, and this provision forbids the imprisonment of the party in default. Where money has been received under an erroneous decision, as this was, and that decision has been reversed, the party receiving it is equitably bound to refund it, and the law will imply a promise on his part to pay it over, as it will ordinarily, in cases where one person receives money belonging to, or for the use of another. The remedy for the case has been provided by section 779 of the Code, which declares, where costs of a motion, or any other sum of money, directed by an order to be paid, are not paid within the time fixed for that purpose by the order, or, if no time is so fixed, within ten days after the service of a copy of the order, an execution against the personal property only of the party required to pay over, may be issued by any party or person to whom the costs or sum of money is made payable by the order. This section plainly includes the application now before the court, and has prescribed the remedy which must be followed for the recovery of the money, and that is by issuing an execution against the personal property of the party required to make the payment.

The motion which has now been made must, therefore, be denied but, as the case has been presented is new, it should be without costs.

BRADY, J., concurred.

Motion denied, without costs.

# MEMORANDA

OF

## CASES NOT REPORTED IN FULL.

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**BERNARD REILLY, LATE SHERIFF, RESPONDENT, v. RUFUS DODGE AND OTHERS, APPELLANTS.**

*Bond of a deputy sheriff for the faithful discharge of his duties—the sureties thereon are bound only for acts done after its delivery—the presumption of its delivery upon the day of its date is destroyed by proof of the time of its actual delivery.*

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The appellant Dodge was a deputy sheriff under the respondent. He had given a bond for the faithful discharge of his duties to the sheriff, but one of the sureties in the bond refused to be longer liable upon it and a new bond was required by the sheriff. The bond in suit was subsequently given. It was signed and acknowledged by Dodge and the defendant Sauer on the 30th day of January, 1878, and by the defendant Dobelman on the 5th day of February, 1878, at which latter date it was delivered to the sheriff. The date of the bond, as found by the referee, was altered from January 30, 1878, to December 1, 1877, before its signature and delivery.

In December, 1877, an execution was placed in Dodge's hands, as deputy sheriff, for collection. He made a levy, by virtue of such execution, on certain property supposed to belong to the defendant in the execution, and sold the same on the 7th of January, 1878. The sheriff was afterwards sued for this levy and sale by a third party, who claimed to be the owner of the property, and a recovery was had in the suit against the sheriff, who having paid the same brought this suit on the bond against Dodge and his sureties.

The court at General Term said: "The only question is whether the bond covers the liability. The well established rule is that such a bond speaks only from its delivery. The delivery is presumptively at its date, but when the time of actual delivery is shown the date becomes unimportant.



"In this case the signing of the bond by Dodge and Sauer took place on the 30th of January, 1878, and by Dobelman, the other surety, on the fifth of February afterwards. The liability for the acts of Dodge under the levy occurred by the sale several weeks before the delivery of the bond in suit. It was not the intention of the sureties to become liable for past transactions, and the language of the bond does not subject them to any such liability. The rules of law controlling the case are settled in *Draper v. Snow* (20 N. Y., 331); *Weller v. Hersee* (10 Hun, 431); *Bissell v. Saxton* (66 N. Y., 55; *Thomson v. McGregor* (81 id., 593). The case is not to be confounded with those in which a bond or undertaking has been given to indemnify the sheriff for proceeding with a levy previously made, in which case the surrounding circumstances show the intention to indemnify against a liability previously incurred."

*Louis M. Doscher*, for the appellants.

*P. Mitchell*, for the respondent.

Opinion by DAVIS, P. J.; BRADY, J., concurred.

Judgment reversed, new trial ordered, costs to abide event.

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ELIZABETH D. VAIL, RESPONDENT, v. WILLIAM M.  
REYNOLDS, APPELLANT

*Error in the charge of the court as to the measure of damages—an exception thereto will not be sustained, when the charge was based upon a fact the existence of which was assumed by the court and both parties upon the trial.*

APPEAL from a judgment in favor of the plaintiff entered upon the verdict of a jury, and also from an order denying the defendant's motion for a new trial, made upon the minutes of the justice before whom the action was tried.

The action was brought to recover damages for fraud and deceit alleged to have been practiced upon the plaintiff by the defendants, William M. Reynolds and Robert M. Reynolds, in the sale to her of a quantity of the stock of the Cisco Consolidated Gold Mining Company. The jury rendered a verdict against the defendant William M. Reynolds, the appellant, but not against the defendant Robert M. Reynolds.

The court, at General Term, after reviewing the evidence and holding that it was sufficient to sustain the verdict, and after overruling certain exceptions to the charge, said : "The most serious objection, however, to the regularity of the trial is the alleged error of the judge in stating to the jury the measure of damages. In this case, the action being for the deceit on the sale of property, the measure of damages is the difference between the value of the stock, as represented and as determined by the value of the mines of the company, and the actual value of the stock, as it really is, and as it is influenced by the actual condition of the mines. The learned judge, however, instructed the jury that the plaintiff was entitled to recover, if they found that the deceit had been established, the amount of money which she had paid out for the stock in question, namely, a balance of eighteen thousand dollars, to which they had the power to add interest.

"The exception to this portion of the charge is as follows : 'I also except to your instruction that if the plaintiff is entitled to recover, she is entitled to recover damages, the amount paid by her on the purchase of the stock, whether that purchase be intended to include or exclude interest ; in either case I except.' For this error we should feel constrained to grant a new trial, except for the fact that the learned trial judge had a right to proceed, as he actually did, upon the hypothesis that the stock held by the plaintiff was worthless. For if, throughout, the trial was conducted on that assumption, in the absence of any special request to charge a different rule, we do not think it is such an error as would require the resubmission of the case to another jury. The testimony of John Cummings is that the stock had no value in 1880, so far as he knew, in a public way. He says there were private sales made on personal assurances, but there was no general value in the market at all so far as he knew. The witness, Franklin Allen, says that the prices were variable and various. "What was the actual value of the stock? I do not think it was worth anything.' At the close of the plaintiff's case the counsel for the appellant said, evidently addressing the counsel for the plaintiff : 'What do you claim?' The counsel for the plaintiff responded : 'We claim twenty thousand five hundred dollars principal, with interest on eighteen thousand five hundred dollars from April 4, 1880;

on three thousand dollars from April 22, 1880; on one thousand dollars from January 12, 1882, and on five hundred dollars from April 10, 1882, from which should be deducted the interest on two thousand five hundred dollars from August 4, 1880.' No dissent was made to this proposition of the counsel for the plaintiff, and it was based upon the testimony already quoted. No request was made to the court to charge the jury a different rule, and therefore, as it seems to us, the trial judge had a right to assume and to act upon that assumption, that the stock held by the plaintiff and which she brought into court and offered to give to the defendant, was worthless, and that no allowance should be made therefor. Doubtless if his attention had been called to the question, by way of a request to charge, the true rule, which is elementary, would have been stated to the jury, but we think that it is not permissible for a party to avail himself of an exception taken in this manner, when the circumstances under which the charge was made exhibit a case where on all sides, both of the court and respective counsel, a fact was necessarily assumed to exist of such serious import as to justify the charge, though technically with the attention of the court called distinctly to the subject-matter, the charge would be so erroneous as to require the reversal of the judgment. We are referred, among other cases that are familiar to the profession, to a decision made by this court in January, 1883, in the case of *Masterton v. Boyce*, a manuscript opinion in which has been furnished us. In that case the true rule of damages was stated by the court to the jury, but the trouble was that the jury did not follow the instructions of the court, and rendered a verdict for the plaintiff for the full sum which had been paid out for the stock. To the favor, and not for legal error, this court granted a new trial. It was shown in that case that the stock was simply diminished in value by reason of the fact that the amount of big vein coal was not so much as it had been reported to be, and that for that reason the value of the mine was materially reduced. And it was further shown that the stock was actually of considerable value. The court said: 'It is evident, from the manner in which the case was submitted to the jury, that the shares were not considered worthless by the learned judge presiding at the trial, for substantially the only view in which the subject of damages was presented

was that which authorized the jury to return the difference between the value of the stock and what it would have been if the property had conformed to the representations made concerning it. That they could render a verdict for the entire purchase-price, still leaving the plaintiff the owner of the stock, did not appear to receive the sanction of the court. Certainly, under the evidence, the jury was not justified in adopting that view. It was directly in conflict with the effect of the proof which had been taken.'

There is a wide difference, therefore, between the facts of the two cases, and the one cannot be said, in any legal sense, to be a guide for the decision in the other.

"It follows, from these considerations, that the judgment should be affirmed, with costs."

*Luther R. Marsh*, for the appellant.

*W. W. Goodrich*, for the respondent.

Opinion by **MACOMBER, J.**; **BRADY** and **DANIELS, JJ.**, concurred.

Judgment affirmed, with costs.

# DECISIONS IN CASES NOT REPORTED.

## FIFTH DEPARTMENT, OCTOBER TERM, 1886.

- The Union Cemetery Association and others, Respondents, v. The City of Buffalo and others, Appellants. — Motion to dismiss appeal denied, without costs. — The judgment, in so far as it restrains the city of Buffalo or the treasurer thereof from paying the orders heretofore issued by the city or the officers thereof, in favor of David W. McConnell, in payment for work wrongfully and falsely certified by the engineer of the city to have been performed by McConnell upon the contract, and in so far as it restrains said McConnell from selling and disposing of any of said orders, is affirmed; in other respects the judgment is reversed, without costs to either party. Order to be settled by Haight, J.
- John M. French, Jr. Appellant, v. Daniel W. Powers, Respondent, Impleaded, etc. — Judgment affirmed, with costs.
- John M. Burkhardt, Respondent, v. James Babcock, Appellant. — Judgment modified by deducting \$119.23, as of the date of the decree, and as so modified affirmed, with costs. Opinion by Barker, J.
- Mary J. Gilligan, Respondent, v. George Fenschter and another, Appellants. — Declined to be considered for the reason that the case does not appear to have been settled by the trial judge.
- Micajah W. Jackson, Plaintiff, v. The City of Rochester, Defendant. — Motion for a new trial denied and judgment ordered for the plaintiff on the verdict, on the authority of *Hooker v. The City of Rochester* (37 Hun, 181).
- George Gorham, Executor, etc., Respondent, v. Millard T. Fillmore, Appellant. — Judgment affirmed, on opinion of Lewis, J., at circuit.
- George N. Collins and others, Respondents, v. George H. Harris, Appellant. — Order affirmed, with ten dollars costs and disbursements. Opinion by Barker, J.
- Thomas Moore, Respondent, v. Henry A. Taylor and others, Appellants.
- Same v. Same.
- Thomas Moore, Claimant, v. The Rochester and Ontario Belt Railway Company and others. — Order affirmed, with ten dollars costs and disbursements, on opinion of referee.
- Edward T. Stevens, as Administrator, etc., Respondent, v. John S. Seibold, Appellant. — Judgment reversed and new trial ordered, costs to abide event. Opinion by Smith, P. J.; Haight, J., not sitting.
- In the Matter of the Petition of Jacob Beehler and others to Drain Swamp Lands in the Town of Hamburg. — Order affirmed, with ten dollars costs and disbursements. Opinion by Haight, J.
- Elizabeth A. S. Rockwell, Respondent, v. J. J. P. Reed, Appellant. — Order affirmed, with ten dollars costs and disbursements.
- Hannah E. Alvey, Respondent, v. Orange W. McKinney, Appellant. — Judgment reversed on a question of fact and a new trial ordered before another referee, costs to abide event, unless the plaintiff stipulates within twenty days to reduce the judgment to \$300 damages, in which case the judgment so reduced is affirmed, without costs of this appeal to either party. Opinion by Smith, P. J.
- The Buffalo and Grand Island Ferry Company, Appellant, v. Lewis F. Allen, Respondent. — Judgment affirmed, with costs. Opinion by Barker, J.
- Charles Fincke and others, as Executors, etc., Respondents, v. The City of Buffalo, Appellants. — Order affirmed, with costs of this appeal. Opinion by Bradley, J.
- Hiram V. Eldridge, Respondent, v. George D. Smith, Appellant. — Judgment affirmed. Opinion by Smith, P. J.; Haight, J., not sitting.
- David Butler, Respondent, v. Hugh M. Montgomery, Appellant. — Judgment affirmed; Haight, J., not sitting.
- Garret Milk and others, Respondents, v. Benjamin Wait, Appellant. — Judgment affirmed, with costs, on opinion of Childs, J., at Special Term, with leave to the defendant to withdraw demurrer and answer within twenty days on payment of the costs of the demurrer and of this appeal.
- James S. Casten, Respondent, v. George V. Decker, Appellant. — Judgment of the County Court affirmed. Opinion by Bradley, J.
- David J. Cridler and another, Respondents, v. Henry Colegrove, Appellant. — Judgment and order reversed and a new trial ordered, costs to abide event. Opinion by Smith, P. J.
- Richard L. Whiting, Respondent, v. Peter Hood and another, Appellants. — Judgment reversed and new trial ordered before another referee, costs to abide event. Opinion by Haight, J.
- The People of the State of New York ex rel Maggie Cartmill and others v. The City of Rochester. — The return to the writ of *certiorari* sent back to the Police Justice to be corrected, by inserting a copy of the ordinance for the violation of which the relators were convicted.
- John Underwood, as Receiver, etc., Appellant, v. Horace T. Cook, Public Administrator, etc., Respondent. — Judgment affirmed, with costs. Opinion by Haight, J.
- Charles Mather, Plaintiff, v. B. Perley Freelove and another, Defendants. — Motion for new trial denied, and judgment ordered for the plaintiff on the verdict. Opinion by Bradley, J.; Smith, P. J., not present.
- The Village of Olean, Plaintiff, v. John King and others, Defendants. — Motion for new trial denied, and judgment ordered for the plaintiff on the verdict. Opinion by Barker, J.; Smith, P. J., not sitting.
- Ann Manktelow, Appellant, v. Hannah Lilly Respondent. — Order reversed, and motion to set aside inquisition granted; ten dollars costs and disbursements to abide event. Opinion by Bradley, J.
- Yette Thalheimer, Appellant, v. Ferdinand Hays and others, Respondents.
- Salle Frankel, Appellant, v. Same, Respondent. — Order in each case affirmed, with ten dollars costs and disbursements in one case.
- Mary Foster, Appellant, v. The City of Buffalo, Respondent. — Judgment affirmed, with costs, upon the opinion of Lewis, J., at Special Term.
- Barker, J., not sitting.
- Edward A. Nealon, Respondent, v. The Grand Trunk Railway Company of Canada, Appellant. — Order reversed and new trial granted, costs to abide event. Opinion by Smith, P. J.; Haight, J., not sitting.
- In the Matter of the Judicial Settlement of the Accounts of John D. Collamer, as Executor, etc. — Decree modified as stated in the opinion, and as so modified affirmed, with costs of the appeal to the respondent, to be paid out of the principal of the estate. Opinion by Smith, P. J.

## FIFTH DEPARTMENT, OCTOBER TERM, 1886.

- Morrison W. Evans, Respondent, v. Clara S. Burton and Another, Appellants, Impleaded, etc.—Order affirmed, with ten dollars costs and disbursements. Opinion by Bradley, J.
- James H. McMaster, Respondent, v. Alvin A. Smith, Appellant.—Order affirmed, with costs. Opinion by Haight, J.
- Le Roy Rundell and others, Appellants, v. George H. Downing and others, Respondents.—Decree reversed and trial of questions of fact specified in the opinion ordered tried by a jury in the Circuit Court of Cayuga County. Costs of this appeal to the appellants, to be paid out of the estate in case they finally succeed in defeating probate of the will. Opinion by Smith, F. J.
- The People of the State of New York, Respondent, v. Charles Kibler, Appellant.—Judgment and conviction affirmed on the authority of *The People, etc., v. Shaffer*, and *The People, etc., v. Mahoney*, decided at last June term.
- Adelbert C. Merritt, Appellant, v. Oliver C. Merritt and another, Respondents.—Judgment affirmed, with costs. Opinion by Haight, J.
- Umar Smith, Respondent, v. John B. Clark, as Trustee, etc., of School District No. 2, Town of Starkey, Appellant.—Judgment and order affirmed. Opinion by Barker, J.
- John B. Howell, Appellant, v. Anna H. Manwaring, as Executrix, etc., and others, Respondents.—Judgment affirmed, with costs. Opinion by Barker, J.
- George H. Phelps, Appellant, v. Lewis Emery, Jr., and others, Respondents.—Judgment affirmed. Opinion by Smith, F. J.; Haight, J., not sitting.
- George H. Ball, Appellant, v. The Evening Post Publishing Company, Respondent.—Order affirmed, without costs. Opinion by Bradley, J.; Haight, J., not sitting.
- In the Matter of the Petition of the New York, Lackawanna and Western Railway Company, Appellant, for Appointment of Commissioners to Appraise Certain Lands of Lorenzo Schmidt, Respondent.—Order affirmed, with costs.
- James Rackham, Appellant, v. Woodworth N. Perry, Respondent.—Order modified by striking therefrom all after and including the words "annulled," to and including the words "enforcing the same," and as so modified affirmed, with leave to Rackham to renew his application to be substituted as plaintiff; ten dollars costs of the appeal to the respondent. Opinion by Barker, J.; Haight, J., not sitting.
- Michael Roche, Appellant, v. Kate Roche, Respondent.—Order reversed, with ten dollars costs and disbursements, and the motion to appoint a receiver granted of that portion of the real estate which was, at the date of the motion, rented, but not to include that portion occupied by the plaintiff and defendant as residents. The case is remitted to the Special Term to appoint a proper person receiver and fix the amount of security to be given. Order to be settled by Haight, J.; opinion by Haight, J.
- John Brock, Respondent, v. Charles Berrick, Appellant.—Order affirmed, without costs to either party.
- Edward J. Kelsey, Respondent, v. James Sargent, Appellant.—Interlocutory judgment affirmed, and motion for new trial denied, with costs. Opinion by Haight, J.
- John McDougal and another, Appellant, v. Mary Nast, Respondent, Impleaded, etc.—Judgment affirmed, with costs. Opinion by Barker, J.; Bradley, J., not sitting.
- Amariah Hammond, Respondent, v. Lester B. Faulkner, Appellant.—Order reversed, with ten dollars costs and disbursements, and the order of the county judge vacated. Childs, J., not sitting.
- Frank Lindner, Appellant, v. Richard P. McBride and others, Respondents. Order affirmed, with ten dollars costs and disbursements.
- Anna M. Smith v. John Atherton.—Appeal dismissed, with costs on default.
- In the Matter of the State Reservation at Niagara.—Appeal by Sarah G. Porter dismissed, with costs on default.
- The People of the State of New York v. James Olney.—Appeal dismissed unless case is served within thirty days.
- The People of the State of New York v. Lorenzo Dimick.—Motion to send case back for correction denied.
- Benjamin F. Tabor v. William N. Hoffman.—Motion for reargument denied, and motion for leave to appeal to the Court of Appeals granted.
- Mary F. Davis, as Administratrix, etc., v. The Chautauque Lake Sunday School Assembly.—Motion for leave to appeal to the Court of Appeals denied.
- Mary Farwell v. Henry N. Griffin.—Motion to put case upon the calendar and for affirmance of judgment granted on default.
- Jacob Jackie v. James Barge.—Motion to dismiss appeal granted on default.
- Byron Alford and another, Respondents, v. Eugene M. Cobb and another, Appellants.—Motion for an order requiring the attorney to restore costs previously paid, denied, without costs.
- Eliza Singleton, as Administratrix, etc., v. Alonzo Smith.—Motion for reargument, or for leave to appeal to the Court of Appeals, denied.
- Arthur G. Yates, Respondent, v. William H. Heath, Appellant.—Motion to strike cause from calendar, and for judgment of affirmance on the ground that printed papers have not been served, granted on default.
- The Rochester City and Brighton Railroad Company, Appellant, v. Rosa Stahley, Respondent.—Motion for reargument denied, without costs. Opinion by Bradley, J.; Angle, J., not voting.
- James G. Doty, as Trustee, etc., Plaintiff, v. Joseph Stanton, as Administrator, etc., Defendant.—Motion to strike cause from calendar, and for judgment of affirmance on the ground that printed papers have not been served, granted on default.
- In the Matter of Everett Spring, an Attorney.—Ordered that he be removed from the office of attorney and counselor of the Supreme Court and that his name be stricken from the roll as such, and that a copy of this order be served upon him by the district attorney of Erie county.

## FOURTH DEPARTMENT, NOVEMBER TERM, 1886.

- The People of the State of New York, Respondents, v. John E. O'Sullivan, Appellant. — Judgment and order reversed and new trial granted. Opinion by Boardman, J.
- Melissa Surdam and others, Respondents, v. Daniel Cornell and another, Appellants, Impleaded, etc. — Judgment reversed and the complaint dismissed, with costs against the plaintiff, in favor of the appellants. Opinion by Boardman, J.; Follett, J., not voting.
- Justus A. Cole, Respondent, v. Tunis Van Slyke and others, Appellants, Impleaded, etc. — Order affirmed, with ten dollars costs; Hardin, P. J., not voting.
- James S. Kerr, as Assignee, Appellant, v. William Adair, Jr., Respondent. Order affirmed, with ten dollars costs and disbursements, upon authority of *Babbitt v. Compton* (1 N. Y., Civil Pro. R., 169).
- Francis Morris, Appellant, v. Addison P. Jones and others, Respondents. Judgment and order reversed and new trial ordered, costs to abide event. Opinion by Hardin, P. J.
- Elisha G. Gay, Appellant, v. Austin Lathrop, Respondent. — Order affirmed, with costs, upon opinion by Justice Martin at Special Term.
- Herman Mosher, Plaintiff, v. George Bennett and others, Defendants. — New trial ordered, with costs to abide event. Opinion by Hardin P. J.
- Aesenth Hoyt, Respondent, v. Harriet Putnam and others, Appellants, Impleaded, etc. — Judgment reversed and new trial ordered, with costs of appeal to be paid by the plaintiff to appellants. Opinion by Boardman, J.
- Polly Terwilliger, Appellant, v. Judson Martin and others, Respondents. — Judgment affirmed, with costs. Opinion by Hardin, P. J.
- John H. Watrous, Respondent, v. John F. Shear, as Commissioner of Highways of the Town of Kirkwood, Appellant. — Judgment of the County Court of Broome county affirming a justice's judgment affirmed, with costs. Opinion by Follett, J.
- The Ithaca Agricultural Works, Appellant, v. Judah Eggleston and another, Respondents. — Appeal dismissed, without costs to either party. (Followed 25 Hun, 287.)
- Jewett H. Brown and others, Appellants, v. Carl Gschihay, Respondent. — Order affirmed, with ten dollars costs and disbursements, on opinion of Merwin, J., delivered at Special Term.
- Daniel H. Zimmer, Appellant, v. David Settle and others, Respondents. — Order affirmed, with costs, on opinion of Learned, P. J., delivered in General Term, Third Department, May, 1884.
- Moses Merick and another, Appellants, v. Edward Kirk, Respondent. — Judgment affirmed, with costs. Opinion by Boardman, J.
- The People of the State of New York, Respondent, v. William B. Johnson, Appellant. — Conviction and judgment affirmed. Dissenting opinion by Follett, J.
- David Gray, Respondent, v. David C. Wolcott, Appellant, Impleaded, etc. — Order of the County Court of Oneida county affirmed, with ten dollars costs and disbursements against David C. Wolcott, Appellant. Opinion by Boardman, J.
- Mary Wall, as Administratrix, Respondent, v. The Delaware, Lackawanna and Western Railroad Company, Appellant. — Judgment and order reversed and a new trial ordered, with costs to abide event. Opinions by Hardin, P. J., Boardman, J., and Follett, J.
- George B. Scoville, as Receiver, etc., Appellant, v. Bronson A. Shed and others, Respondents. — Judgment affirmed, with costs. Opinion by Hardin, P. J.
- Harley J. Peet, Respondent, v. Eri Kent, Appellant. — Judgment reversed and a new trial ordered, with costs to abide the event, unless the plaintiff shall stipulate to deduct from the judgment thirty-seven dollars and sixty-five cents as stated in the opinion, in which case the judgment so modified is affirmed, without costs of the appeal to either party. Opinion by Boardman, J.
- Mary E. Wright, Respondent, v. Isaac Frankel, Appellant. — Judgment of the County Court of Onondaga county affirmed, with costs. Opinion by Follett, J.
- Joseph E. West, as Administrator, etc., Respondent, v. George A. Reynolds and others, Appellants. — Judgment and order affirmed, with costs, and leave given to defendants to withdraw the demurrer and answer in twenty days, upon payment of costs of demurrer and of this appeal. Opinion by Hardin, P. J.
- Jacob Kent, Respondent, v. Jacob Crouse, Appellant. — Interlocutory judgment affirmed, with costs of appeal on opinion of Merwin, J., at Special Term, and leave given to answer in twenty days, upon payment of costs of the demurrer and of the appeal.
- Alfred Akerley, Respondent, v. Allen Lasher, Appellant, Impleaded, etc. — Judgment of the County Court of Delaware county affirmed, with costs. Opinion by Follett, J.
- Harriet S. Beach, v. John C. Knox. — Motion denied, without costs.
- Charles Renton v. William Anstin. — Judgment affirmed, with costs.
- Lyman M. Sherwood, Executor, etc., Appellant, v. Israel D. Armsby, Respondent. — Motion denied, without costs.
- Orlando J. Childs and another, Respondent, v. Harris Manufacturing Company, Appellant. — Order affirmed, with ten dollars costs and disbursements.
- In the Matter of Albert Van Horne, an Habitual Drunkard. — Order affirmed, with ten dollars costs and disbursements against the appellant.
- Albert Holt and another, Respondents, v. Samuel R. Kopelowich and others, Appellants. — Order affirmed, with ten dollars costs and disbursements.
- Peter Whitaker, Respondent, v. The Press Publishing Company, Appellant. — Order affirmed, with ten dollars costs and disbursements.
- Charles S. Bitter, Respondent, v. The Onondaga County Savings Bank, Appellant. — Declined to hear, and leave given to either party to have the case and exceptions resettled before Mr. Justice Vann, upon eight days' notice.
- Lyman M. Sherwood, as Executor, etc., Appellant, v. Israel D. Armsby, Respondent. — Order affirmed, with ten dollars costs and disbursements.
- Patrick Quinlan and the City of Syracuse v. Elnathan Sweet and De Forest D. Candee. — Motion for preliminary injunction granted, plaintiffs required to give an undertaking in the sum of \$1,000.

## THIRD DEPARTMENT, NOVEMBER TERM, 1886.

John Brotherson, Respondent, v. John Consalus, Executor, etc., Appellant.—Order affirmed, with ten dollars costs and printing disbursements. Opinion by Landon, J.

John Brotherson, Respondent, v. John Consalus, Executor, etc., Appellant.—Judgment modified by striking out \$74.29 as of October 30, 1885, and as modified affirmed, without costs. Opinion by Landon, J. Order to be settled by Landon, J.

George M. Wiswall, as Administrator, etc., Appellant, v. Edward O'Brien and Others, Respondents.—Judgment affirmed, with costs. Opinion by Bockes, J.

Harriet Van Horne, Administratrix, etc., Appellant, v. Boston, Hoosac Tunnel and Western Railroad Company, Respondent.—Judgment affirmed, with costs. Opinion by Bockes, J.

James G. Patton, Respondent, v. Daniel A. Buiard and Others, Appellants.—Judgment affirmed, with costs. Opinion by Learned, P. J.

Anna Livingston, Respondent, v. Peter Livingston, Appellant.—Judgment affirmed, with costs. Mem. by Landon, J.

Clara Belle Doughty, Appellant, v. Collins Doughty and others, Respondents.—Judgment reversed, new trial granted, costs to abide event; referee discharged. Opinion by Learned, P. J., and by Bockes, J., dissenting.

American Society for Prevention of Cruelty to Animals v. City of Cohoes.—Judgment affirmed, with costs. Opinion by Bockes, J.

Henry Tefft and others, Respondents, v. George M. Bissell, Appellant.—Judgment affirmed, with costs. Opinion by Landon, J.

Andrew McClure, Appellant, v. New York Central and Hudson River Railroad Company, Respondent.—Judgment affirmed, with costs. Opinion by Learned, P. J.

Kazia Brockway, Respondent, v. John W. Tynnor and others, Appellants.—Judgment modified by directing the payment first to the administrator of the \$1,300 mortgage and interest, next the costs of the guardian *ad litem*; next the plaintiff's claim, and the balance to the heirs of Woodhull. Opinions by Learned, P. J., and Landon, J.; ordered to be settled by Landon, J.

Robert L. Day and another, Respondents, v. Ogdensburg and Lake Champlain Railroad Company and others, Appellants.—Interlocutory judgment affirmed, with costs, with leave, etc. Mem. by Bockes, J. (Cause certified to Court of Appeals under sub. 4, sec. 190, Code.)

John Hogan, Respondent, v. James Ryan, Appellant.—Judgment and order reversed, new trial granted, costs to abide event. Opinion by Landon, J.

Walter S. Church, Appellant, v. Johan Jost Becker, Respondent.—Judgment affirmed, with costs. Opinion by Landon, J., dissenting.

Elizabeth Phillips, Executrix, etc., Respondent, v. The Troy and Boston Railroad Company, Appellant.—Judgment and order affirmed, with costs. Opinion by Learned, P. J., and by Landon, J., dissenting.

George W. Holcomb, Respondent, v. Elizabeth B. Holcomb, Appellant.—Judgment affirmed, with costs. Opinion by Learned, P. J.

Anna M. Tisdale, Respondent, v. Delaware and Hudson Canal Company, Appellant.—Judgment and order affirmed, with costs. Opinion by Bockes, J.

Catharine Taylor, Respondent, v. City of Cohoes, Appellant.—Order reversed, with ten dollars

costs and printing disbursements, and motion granted, with costs. Opinion by Learned, P. J.

John E. Van Eiten, Appellant, v. Jonathan H. Hasbrouck, Respondent.—Order reversed, without costs; motion denied, without prejudice, according to opinion. Opinion by Bockes, J.

Albany County Bank, Respondent, v. William B. Scott, Appellant.—Judgment affirmed, with costs. Opinion by Bockes, J.

Garret M. Clute, Respondent, v. New York Central and Hudson River Railroad Company, Appellant.—Judgment reversed, new trial granted, costs to abide event. Opinion by Learned, P. J.; Landon, J., not acting.

The Phoenix Mills, Respondent, v. James A. Miller, Appellant.—Judgment and order reversed, new trial granted, costs to abide event. Opinion by Bockes, J.

Elmer J. Albert, Respondent, v. Elanath Sweet, Jr., and others, Appellants.—Judgment affirmed, with costs. Opinion by Learned, P. J.

Jacob Kreisler, Respondent, v. Gottlieb Vetter, Appellant, Impleaded, etc.—Judgment affirmed, with costs. Opinion by Bockes, J.

George L. Willaie, Surviving Partner, etc., Respondent, v. The Village of Greenbush, Appellant.—Judgment affirmed, with costs. Opinion by Bockes, J.

Matter of Application of Water Commissioners of Amsterdam to Acquire Lands, Respondents, v. Stephen Collins and Another, Appellants.—Order reversed, with ten dollars costs and printing disbursements, and motion reversed, with ten dollars costs. Opinion by Learned, P. J.

John W. French, Respondent, v. Emma J. Kenworthy and others, Appellants.—Order affirmed, with ten dollars costs and printing disbursements as to Effie B., and appeal dismissed as to Charles A., with ten dollars costs to be paid by general guardian. Opinion by Learned, P. J.

Daniel Vrooman, Respondent, v. Elizabeth Clow, Appellant.—Judgment modified in accordance with opinion. Opinion by Learned, P. J.

William H. Thorn, Overseer, etc., Respondents, v. Charles Hadden, Appellant.—Order affirmed, with ten dollars costs and printing disbursements. Opinion by Learned, P. J.

Chester Dusty, Respondent, v. Magdalena B. Lansing, Appellant.—Order reversed and motion granted on payment of ten dollars costs and ten dollars costs of appeal and printing disbursements. Opinion by Learned, P. J.

Perqua v. Perqua.—Motion granted on condition. (See order on file.) Opinion by Bockes, J.

Simeon Cunliff, Appellant, v. Delaware and Hudson Canal Company, Respondent.—Order affirmed, with ten dollars costs and printing disbursements. Opinion by Bockes, J.

Mary T. Biden, Executrix, etc., Respondent, v. Edward F. James, Appellant, Impleaded, etc.—Judgment affirmed, with costs. Opinion by Learned, P. J.

Catharine Draper, Appellant, v. Delaware and Hudson Canal Company, Respondent.—Judgment affirmed, with costs. Opinion by Learned, P. J.

Henry C. Smith, Receiver, etc., Respondent, v. Willis H. Bellows and others, Appellants.—Judgment reversed, new trial granted, costs to abide event. Opinion by Learned, P. J.

Abram V. Morris v. Francis A. Fales. Order resettled and fled.



## SECOND DEPARTMENT, DECEMBER TERM, 1886.

## THIRD DEPARTMENT, DECEMBER TERM, 1886.\*

The American Society for the Prevention of Cruelty to Animals, Respondent, v. The City of Cohoes, Appellant. — Motion to go to the Court of Appeals denied.

Caroline W. Lawrence and others, Respondents, v. The Saratoga Lake Railway Company, Appellants. — Judgment affirmed, with costs. Opinion by Learned, P. J.

Frank A. Cantwell, Appellant, v. Michael L. Burke and Willard Collins, Respondents. — Judgment reversed, new trial granted, costs to abide event. Opinion by Landon, J.

Mary McGrath, Respondent, v. The Metropolitan Life Insurance Company, Appellant. — Judgment affirmed, with costs. Opinion by Bockes, J.

J. Townsend Burden, Respondent, v. James A. Burden and others, Appellants. — Order affirmed, with ten dollars costs and printing disbursements. Opinion by Learned, P. J.

Hubbard J. Goodrich, Appellant, v. The New York Central and Hudson River Railroad Company, Respondent. — Motion for new trial denied and judgment ordered for defendant. Opinion by Learned, P. J.

Lizzie Payne and others, Respondents, v. The Mutual Relief Society of Rochester, New York, Appellant. — Judgment affirmed, with costs. — Opinion by Bockes, J.

Mary Duel, Respondent, v. John L. Getman, Appellant. — Judgment and order affirmed, with costs. Opinion by Bockes, J.

John A. Thompson, Respondent, v. Rowland N. Hazard and Stephen F. Moriarty, Appellants. — Judgment reversed, new trial granted, referee discharged, costs to abide event. Opinion by Landon, J.

John R. Freer, Respondent, v. Henry J. Budington, Appellant. — Judgment affirmed, with costs. Opinion by Bockes, J.

Jacob I. Signer, Respondent, v. Alvah S. Newcomb, Appellant. — Judgment and order reversed, new trial granted, costs to abide event. Opinion by Landon, J.

William H. Dedrick and William H. Burgess, Respondents, v. Richard H. Leonard, Appellant. — Judgment reversed, new trial granted, referee discharged, costs to abide event. Opinion by Learned, P. J.

Gilbert Cronk, Appellant, v. Charles M. Barlow, Respondent. — Judgment of County Court affirmed, with costs. Opinion by Learned, P. J.

Perqua v. Perqua. — Former motion opened and motion reheard. Former order vacated and original motion denied and stipulation under former order vacated.

## SECOND DEPARTMENT, DECEMBER TERM, 1886.

William Le Count, Appellant, v. Sarah E. Greenley, Respondent. — Order granting new trial affirmed, with costs. Opinion by Barnard, P. J.

Ann C. Clark, Plaintiff, v. Brooklyn Elevated Railroad Company, Defendant. — Order affirmed, with costs and disbursements. Opinion by Dykman, J.

Fidella E. Manning, Plaintiff, v. John B. Sweeting, Defendant. — Judgment affirmed upon plaintiff's appeal. Part of judgment appealed from by defendant affirmed, without costs to either party on either appeal. Opinion by Barnard, P. J.

The People of the State of New York *ex rel.* Mary C. Gibson, Respondent, v. The Board of Assessors of the Town of Flushing, Appellant. — Order reversed, with fifty dollars costs of appeal. Opinion by Barnard, P. J.

Maria Thornton and another, Executors, etc., Respondents, v. Isaac Harris and Others, Appellants. — Judgment and order denying new trial affirmed, with costs. Opinion by Barnard, P. J.

Dykman Odell, Respondent, v. Isaac Buckhout, as Executor, etc., Appellant. — Judgment affirmed, with costs. Opinion by Barnard, P. J.; Dykman, J., not sitting.

Sylvester S. Mangam and Others, as Executors, etc., Respondents, v. Richard W. Peck, Appellant. — Judgment affirmed, with costs. Opinion by Dykman, J.; Pratt, J., not sitting.

Matter of Probate of Will of James Morgan. — Decree of surrogate affirmed, with costs. Opinion by Barnard, P. J.

James Sweet, Plaintiff, v. John H. Ross, Defendant. — Judgment affirmed for non-submission of papers under order. Pratt, J., not sitting.

Catherine T. Malloy, Respondent, v. The Town of Pelham, Appellant. — Judgment and order denying new trial affirmed, with costs. Opinion by Pratt, J.

Frances W. Pettengill, Plaintiff, v. City of Yonkers, Defendant. — Judgment and order denying new trial affirmed, with costs. Opinion by Barnard, P. J.; Dykman, J., not sitting.

Thomas Halpin, Respondent, v. Phoenix Insurance Company, Appellant. — Judgment affirmed, with costs. Opinion by Dykman, J.; Pratt, J., not sitting.

John Schenck, Respondent, v. George Ringler and others, Appellants. — Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.

John J. Barton, Respondent, v. William Govan, Appellant. — Judgment and order denying new trial affirmed, with costs. Opinion by Barnard, P. J.

Mary A. Ross, Appellant, v. John Duffy, Sheriff, etc., Respondent. — Order reversed, with costs and disbursements, and motion denied. Opinion by Pratt, J.; Dykman, J., not sitting.

Julius Marcell, Respondent, v. Anguste Saltzman, as Executor, etc., Appellant. — Order affirmed, with ten dollars costs and disbursements. Opinion by Dykman, J.

William H. Odell, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant. — Judgment and order denying new trial affirmed, with costs. Opinion by Barnard, P. J.; Dykman, J., not sitting.

Matter of Application of Henry M. Elliott. — Order affirmed, with costs and disbursements. Opinion by Pratt, J.

Alexander B. Hudson, Respondent, v. Cornelius J. Kowing, Appellant. — Order affirmed, with costs and disbursements. Opinion by Barnard, P. J.; Dykman, J., not sitting.

The Importers and Traders' National Bank and others, Respondents, v. Clarence Perine and others, Appellants. — Order refusing extra allowance affirmed, with costs. Opinion by Pratt, J.; Dykman, J., not sitting.

Matter of Last Will of Abijah S. Feeka. — Decree of surrogate reversed, without costs of

\* Decisions handed down December 18, 1886, and January 4, 1887.

## SECOND DEPARTMENT, DECEMBER TERM, 1886.

- appeal; proceedings remitted to surrogate. Opinion by Barnard, P. J.
- Sherwood Sterling, Respondent, v. The Metropolitan Life Insurance Company, Appellant. — Order referring action affirmed, with costs and disbursements. Opinion by Dykman, J.; Pratt, J., not sitting.
- Sherwood Sterling, Respondent, v. The Metropolitan Life Insurance Company, Appellant. — Order refusing motion to compel a reply affirmed, with costs and disbursements. Opinion by Dykman, J.
- Charles H. Meade and another, Plaintiff, v. Walter C. Tuckerman, Defendant. — Order affirmed, with ten dollars costs, besides disbursements. Opinion by Dykman, J.
- Gheirstein Mead, Respondent, v. John Brunner and others, Defendants. Harry J. Lea, Purchaser, Appellant. — Order affirmed, with costs and disbursements. Opinion by Barnard, P. J.
- Benjamin F. Underhill and another, Respondents, v. Sarah A. Underhill and others, Appellants, Impleaded, etc. — Judgment affirmed, with costs. Opinion by Barnard, P. J.; Dykman, J., not sitting.
- Mosher A. Southerland, Respondent, v. George W. Mead, Appellant. — Order affirmed, with costs and disbursements. Opinion by Dykman, J.
- William J. Beard, Appellant, v. Elbert Kipp, Respondent. — Order affirmed, with costs and disbursements. Opinion by Dykman, J.
- John White, Appellant, v. James Boyce and another, Respondents. — Order confirmed, without costs and disbursements. Opinion by Pratt, J.; Barnard, P. J., not sitting. Judgment affirmed, with costs. Opinion by Barnard, P. J.; Pratt, J., dissenting.
- Joseph W. Palmer, Respondent, v. The Pennsylvania Company, Appellant. — Judgment and order denying new trial affirmed, with costs. Opinion by Pratt, J.; Barnard, P. J., not sitting.
- Mary A. Gordon, Plaintiff, v. Herman H. Niemann and others, Defendants. — Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.
- Elizabeth Stillwell, Individually, etc., Respondent, v. August Zinsler, Appellant. — Judgment and order denying new trial affirmed, with costs. Opinion by Pratt, J.
- General Synod of the Reformed Church in America, Plaintiff, v. Eliza L. Lincoln and others, Defendants. — Order affirmed, with costs and disbursements. Opinions by Barnard, P. J., and Pratt, J.
- Eliza A. Beveridge, Plaintiff, v. The New York Elevated Railroad Company, Defendant. — Judgment affirmed on opinion at Special Term.
- The People of the State of New York *ex rel.* Deverell, Plaintiff, v. Musical Protective Union, Defendant. — Motion denied. Opinion by Justice Dykman.
- Charles P. Berdell, Appellant, v. Eliza W. Parkhurst, Respondent. — Order affirmed, with costs and disbursements. Opinion by Pratt, J.
- Charles W. Cooke, Plaintiff, v. The Lalanco Grocean Company, Defendant. — Motion denied.
- Russel Coe, Respondent, v. Robert C. Davidge, Appellant. — Order affirmed, with costs and disbursements. Opinions by Justices Barnard and Pratt.
- Charles P. Berdell, Appellant, v. James W. Hoyt, Respondent. — Order affirmed, with costs and disbursements. Opinion by Pratt, J.
- Louis Sledenbach, Appellant, v. Julia A. Riley, Administratrix, etc., Respondent. — Judgment and order denying new trial affirmed, with costs. Opinion by Pratt, J.
- Edward Van Orden and others, Respondents, v. Charles S. Schleier and others, Appellants. — Judgment affirmed, with costs. Opinion by Dykman, J.
- Mary Burns, Respondent, v. James Bostwick, Jr., Appellant. — Judgment and order refusing new trial reversed and new trial granted, costs to abide event. Opinion by Pratt, J.; Barnard, P. J., not sitting.
- Margaret Shiner, Administratrix, etc., Respondent, v. Horace Russell and another, as Receivers, etc., Appellants. — Judgment and order denying new trial affirmed, with costs. Opinion by Pratt, J.
- Janie Linton Morris, as Administratrix, etc., Respondent, v. Walston H. Brown and others, Appellants. — Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.; Barnard, P. J., not sitting.
- Alvia Fisher, an Infant by, etc., Respondent, v. William Martin, Appellant. — Judgment affirmed, with costs. Opinion by Pratt, J.
- Louisa K. Hall, Appellant, v. Harvey Hall, Respondent. — Judgment affirmed, with costs. Opinion by Barnard, P. J.; Pratt, J., not sitting.
- Eliza A. Munoz, as Administratrix, etc., Respondent, v. George Wilson and others, Appellants. — Judgment affirmed, with costs. Opinion by Pratt, J.; Dykman, J., dissenting.
- Cornelius Ivory, Respondent, v. The Town of Deerpark, Appellant. — Judgment and order denying new trial, affirmed, with costs. Opinion by Dykman, J.; Barnard, P. J., not sitting.
- Patrick Myles, Appellant, v. The New York, New Haven and Hartford Railroad Company, Respondent. Judgment reversed and new trial granted, costs to abide event. Opinion by Barnard, P. J.; Pratt, J., dissenting.
- Charles Van Fleet, Respondent, v. William S. Ketcham, Appellant. — Judgment affirmed, with costs. Opinion by Pratt, J.
- Sadie Tilley, Appellant, v. William W. Goodrich, Respondent, Impleaded, etc. — Judgment affirmed, with costs out of the fund. — Opinion by Dykman, J.
- Sarah McGlynn, Respondent, v. The Brooklyn Croastown Railroad Company, Appellant. — Judgment and order denying new trial affirmed, with costs. Opinion by Barnard, P. J.
- Samuel L. Ludlow, Plaintiff, v. George W. Mead, Defendant. — Order affirmed, with costs and disbursements. Opinion by Pratt, J.
- William Brocstedt, Plaintiff, v. Henry Breslin, Defendant. — Order affirmed, with costs and disbursements. Opinion by Dykman, J.
- In the Matter of Assignment of John Raber for Benefit of Creditors. — Motion denied, with ten dollars costs. Opinion by Barnard, P. J.
- Isaac Knece, Jr., Plaintiff, v. Ellen Knykendall and others, Defendants. — Order reversed and purchaser released; purchase money to be returned; Appellant to have disbursements on appeal only. — Opinion by Dykman, J.; Pratt, J., not sitting.
- Robert L. Carpenter, Appellant, v. Orville O. Jones and others, Respondents. — Judgment affirmed with costs. Opinion by Pratt, J.; Barnard, P. J., not sitting.
- The People of the State of New York *ex rel.* Nicholas Cooper, Appellant, v. The Registrar of Arrears of the City of Brooklyn, Respondent. — Order denying motion for peremptory *mandamus* reversed and motion granted that an alternative writ issue, costs to abide event. Opinion by Barnard, P. J.
- In the matter of the application of John A. Wells, Executor, etc. — Order of Surrogate reversed, with costs to appellant out of the estate, and proceedings remitted. Opinion by Barnard, P. J.
- The People of the State of New York *ex rel.* James F. Gillen, Respondent, v. Henry Wolfert, Supervisor etc., Appellant. — Order affirmed, with costs and disbursements. Opinion by Dykman, J.; Pratt, J., not sitting.
- Ella M. Ten Broeck, Respondent, v. The Traveler's Insurance Company, Appellant. — Judgment and order denying new trial affirmed, with costs. Opinion by Pratt, J.

## SECOND DEPARTMENT, DECEMBER TERM, 1886.

- Adolph Gabner, as Administrator, etc., Plaintiff, v. James Vick and another, as Executor, etc., Defendants. — Judgment affirmed, with costs. Opinion by Barnard, P. J.
- Bridget Collins, Administratrix, etc., Respondent, v. The New York and New Haven and Hartford Railroad Company, Appellants. — Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.
- James Jourdan, as Receiver, etc., Respondent, v. The Long Island Railroad Company, Appellant. — Judgment and order denying new trial affirmed, with costs. Opinion by Pratt, J.
- Samuel D. Hoyt, Respondent, v. The New York, Lake Erie and Western Railroad Company, Appellants. — Judgment and order denying new trial affirmed, with costs. Opinion by Barnard, P. J.
- Julia Foy, an Infant, etc., Respondent, v. William Buchanan and another, Appellants. — Judgment and order denying new trial reversed and new trial granted, costs to abide event. Opinion by Pratt, J.
- Henry T. Pratt, Appellant, v. Moses Wertheimer and others, Respondents. — Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.
- James McCormick, Plaintiff, v. John P. Crawford, defendant. — Exceptions overruled and judgment for defendant upon the nonsuit ordered at circuit. Opinion by Barnard, P. J.; Pratt, J., not sitting.
- George M. Mittenacht, Appellant, v. Joseph Wolf, Respondent. — Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.
- Emma L. Wendling, Respondent, v. Hannah Bainbridge and others, Appellants. — Judgment and order denying new trial reversed and new trial granted, costs to abide event. Opinion by Pratt, J.
- Louis H. Dickerson, Plaintiff, v. La Devalson Gordon, Defendant. — Motion denied, with ten dollars costs. Opinion by Dykman, J.
- Thomas Doyle, Appellant, v. The Rector, etc., of Trinity Church, Respondent. — Reargument ordered.
- Susan W. Bryan, Appellant, v. Abram Viele and Cornelia, his wife, Respondents. — Order sustaining demurrer affirmed, with costs as to amended complaint, and appeal dismissed from order permitting an amendment to original complaint. Opinions by Justices Barnard and Pratt.
- Maria L. Hood, as Executrix, etc., Respondent, v. John N. Hayward, Appellant, Impieaded, etc. — Motion to dismiss appeal from part of order giving leave to amend summons granted, with ten dollars costs. Opinion by Pratt, J.; Dykman, J., not sitting.
- George Cox, Respondent, v. William A. Baeder and another, Respondents. — Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.
- David S. McLaughlin, Respondent, v. Thomas S. Lester, Appellant. — Judgment affirmed, with costs. Opinions by Justices Barnard and Pratt.
- Thomas J. Bannon, Appellant, v. Ellen Cleary, Respondent. — Judgment affirmed, with costs. Opinion by Pratt, J.
- The General Synod of the Reformed Church of America, Plaintiff, v. Eliza L. Lincoln, Defendant. — Orders affirmed, with costs and disbursements.
- Powers, Petitioner, v. James Jourdan, Receiver, etc. — Order reversed, with costs and disbursements, and motion denied, without costs. Opinion by Dykman, J.
- William Biggs, Respondent, v. Martin Schultz and others, Appellants. — Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.
- Patrick Murphy, Jr., by Guardian, etc., Respondent, v. William H. Mairs, Appellant. — Judgment affirmed, with costs; exceptions overruled. Opinions by Justices Pratt and Barnard.
- Kate Feeney, Respondent, v. The Long Island Railroad Company, Appellant. — Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.
- Amos Bryan, Plaintiff, v. George Wilson and others, Defendants. — Judgment and order denying new trial reversed and new trial granted, costs to abide event. Opinion by Dykman, J.
- Frank Bowman, Respondent, v. Charles G. Johnston, Appellant. — Judgment modified in accordance with opinion; order to be settled by Justice Barnard. Opinion by Barnard, P. J.
- William Nelson, Appellant, v. Edward Gridley, Respondent. — Judgment and order denying new trial affirmed, with costs. Opinion by Pratt, J.; Barnard, P. J., not sitting.
- John McClain, Respondent, v. The Brooklyn City Railroad Company, Appellants. — Judgment and order denying new trial affirmed, with costs. Opinion by Barnard, P. J.
- Peter Riley, Respondent, v. The Phoenix Insurance Company, Appellant. — Judgment and order denying new trial affirmed, with costs. Opinion by Pratt, J.; Barnard, P. J., not sitting.
- Julia Frear, Appellant, v. Franklin Sweet and others, Respondents. — Judgment affirmed, with costs. — Opinion by Dykman, J.; Barnard, P. J., not sitting.
- Ezra White, Respondent, v. Minerva E. Gaines, Appellant. — Judgment affirmed, with costs. Opinion by Pratt, J.; Barnard, P. J., not sitting.
- Thomas M. King and others, Plaintiffs, v. Reon Barnes and others, Defendants. — Judgment modified in accordance with opinion. Order to be settled by Justice Pratt. Opinion by Pratt, J.
- Mary Meegan, Respondent, v. William Hardenbrook, Appellant. — Judgment affirmed, with costs. Opinion by Pratt, J.
- Catharine C. Murphy, Respondent, v. The Brooklyn City Railroad Company, Appellant. — Judgment and order denying new trial affirmed, with costs. — Opinion by Barnard, P. J.
- George Shaper, Respondent, v. The Brooklyn and Long Island Cable Railway Company, Appellant. — Judgment affirmed, with costs. Opinion by Dykman, J.
- Abraham Sanger, Jr., and another, Appellants, v. Leander Waterbury and another, Respondents. — Judgment affirmed, with costs. Opinion by Pratt, J.
- Charles H. Hunter, Respondent, v. The New York, Ontario and Western Railroad Company, Appellant. — Judgment affirmed, with costs. Opinion by Dykman, J.
- Yonkers Gas-Light Company, Respondent, v. Allen Taylor, Appellant, Impieaded, etc. — Order sustaining demurrer to defendant's answer, and judgment thereon reversed and judgment given for defendant, with costs. Opinion by Pratt, J.; Dykman, J., not sitting.
- Charles T. Redfield, Respondent, v. Charles W. Stitt, as Executor, etc., Appellant. — Judgment and order denying new trial reversed and new trial granted, costs to abide event. Opinion by Barnard, P. J.; Dykman, J., dissenting.
- John F. Clark, Appellant, v. Mary A. Clark, Respondent. — Order allowing alimony and order refusing to modify the same affirmed, with costs and disbursements. Opinions by Justices Barnard and Pratt.
- Bank of Indianapolis, Plaintiff, v. Alftman Bly, Receiver, etc., Defendant. — Motion denied, with ten dollars costs. Opinion by Dykman, J.
- Frank W. Halsted, Plaintiff, v. Isaac W. Sherrill, Defendant. — Judgment affirmed, with costs. Opinion by Pratt, J.; Dykman, J., dissenting.

## FIRST DEPARTMENT, OCTOBER TERM, 1886.

The People of the State of New York, Appellant, v. James A. Thorn, Respondent. — Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.

The People of the State of New York, Appellant, v. Ralph R. Pearall, Respondent. — Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.

The People of the State of New York, Appellant, v. John G. Clark, Respondent. — Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.

The People of the State of New York, Appellant, v. James Titus, Respondent. — Judgment and order denying new trial affirmed, with costs. Opinion by Dykman, J.

## FIRST DEPARTMENT, OCTOBER TERM, 1886.\*

Matter of Alma Nichols. — Order reversed and petition remanded. Opinion *Per Curiam*.

John F. Klumpp and another, Respondents, v. Guy H. Gardner, and another, Appellants. — Order affirmed, with ten dollars costs and disbursements.

Matter of Susan A. Place, deceased. — Order affirmed, without costs. Opinion by Daniels, J. William H. Catlin and another, Respondents, v. The Adirondack Company, Appellant. — Order affirmed, without costs. — Opinion *Per Curiam*.

The People of the State of New York v. Universal Life Insurance Company. — Order affirmed, with ten dollars costs and disbursements.

Thomas D. Kelly, Appellant, v. The Press Publishing Association, Respondent. — Order affirmed, without costs.

Anna Borkel, Appellant, v. Samuel S. Mulford, Respondent. — Order modified by requiring the defendant to stipulate that the deposition of witnesses, residing in New York and Pennsylvania, may be taken on ten days' notice before James J. Nealis, referee, and to be read on the trial to the same effect as though the witnesses were personally present, and as modified affirmed, without costs.

James Cassidy and another, Plaintiffs, v. Henry Gottgetrue, Assignee, etc., Defendant. — Order modified by directing that the judgment and report of the referee be opened so far as to allow the respondents to appear, upon notice to the appellants and to the several other parties to the judgment, before the said referee, and give any testimony tending to increase the claim which the referee has allowed in their favor, and to diminish or affect the debt allowed to the plaintiff and any other creditors in the actions, and on the coming in of the report of the referee to raise any question as to the costs and allowances appearing in the judgment, and as to the amounts awarded to any of the parties. The costs of such new hearing and proceeding before the referee and of the judgment and of this appeal to abide the event.

Michael Snow, Respondent, v. The Russell Coe Fertilizer Company and another, Appellants. — Order modified by striking out the second subdivision of the order restraining Robert C. Davidge from representing himself to be the successor of the defendant and without prejudice to an application, on proper papers and security, for an injunction, and as modified affirmed, without costs.

Paul Krotel, Receiver, etc., Respondent, v. Henry F. Williams and another, Appellants. — Judgment affirmed, with costs.

James O'Shea, Respondent, v. David L. Eisner, Appellant, Impleaded, etc. — Order affirmed, with ten dollars costs and disbursements.

Central Trust Company of New York v. New York City and Northern Railway Company. — Order affirmed, with ten dollars costs and disbursements.

Margaretha Finner and others, Executors, etc., Respondents, v. Julius Hinz and others, Appellants. — Judgment reversed, new trial ordered, costs to abide event. Opinion *Per Curiam*.

James Naser and another, Respondents, v. The First National Bank of the City of New York, Appellant. — Judgment affirmed. Opinion *Per Curiam*.

Peter Swan, Respondent, v. George Caffé and another, Appellants. — Judgment affirmed. Opinion by Davis, P. J.

William Neidlinger, Appellant, v. John B. McIntire, Respondent, Impleaded, etc. Judgment affirmed.

The People of the State of New York *ex rel.* Edward G. Ames v. Joseph Koch and others, Respondents. — Dismissal of relator reversed, with costs.

Josephine M. McBride, Respondent, v. Robert P. McBride, Appellant. — Orders affirmed, with ten dollars costs and disbursements.

William F. Redlich, Respondent, v. Hermann N. Smith, Appellant.

Isaac S. Enyard and another, Respondents, v. Same, Appellant. — Orders affirmed, with ten dollars costs in one case and the disbursements in both.

Edward Wood, Appellant, v. Karoline Kroll and others, Respondents. — Order reversed, without costs. Opinion *Per Curiam*.

The Congregation "Hand in Hand," Appellant, v. Eva Muller and another, Respondents. — Order affirmed, without costs.

Gotthold Haug, Respondent, v. Christopher Reissner, Appellant. — Judgment affirmed, with costs. Opinion *Per Curiam*.

J. Lippit Snow and another, Appellants v. Eli Gibbon and another, Respondents. — Order affirmed, with ten dollars costs and disbursements.

Caroline L. Merchant, Appellant, v. Joseph Eickhorn and another, Respondents. — Judgment affirmed.

James C. Seymour, Appellant, v. The Castner Carbon Company and others, Respondents. — Judgment affirmed on opinion of the court below.

Leonard Lewisohn, Respondent, v. Bertram Niederwieser, Appellant. — Motion denied.

Edward M. Knox, v. Commercial Agency and others. — Motion denied, without costs. *Mem. Per Curiam*.

The People of the State of New York *ex rel.* H. D. Nicoll, v. Infant Asylum. — Motion granted unless duly certified copies of the case be served within ten days, and ten dollars costs of motion be paid. Opinion *Per Curiam*.

Ruth A. Post, Respondent, v. Mary J. Stockwell, Appellant. — Motion denied without prejudice to its renewal in case the papers on appeal are not served within thirty days after service of a copy of this order.

In the matter of Robert Willets. — Decree affirmed on opinion of surrogate.

\* Decisions handed down December 31, 1886.

## FIRST DEPARTMENT, OCTOBER TERM, 1886.

Robinson Consolidated Mining Company, v. William H. Craig and another. — Motion denied without costs. Opinion by Daniels, J.

Theodore F. Reed, Appellant, v. Isaac W. Edsall, Respondent. — Order affirmed, with ten dollars and disbursements.

Levi M. Bates and others, Respondents, v. Hiram Jones and another, Appellants. — Order affirmed, with ten dollars and disbursements.

Kate Hogan, Administratrix, etc., Appellant, v. David Henderson Respondent. — Motion denied, with costs. Opinion by Daniels, J.

Charlotte A. Wakeman, v. George H. Everett. — Motion for reargument denied.

The Bowery National Bank, Respondent, v. The Mayor, etc., of the City of New York, Appellants. — Order reversed, with ten dollars costs and disbursements, and order entered as directed in opinion. Opinion by Daniels, J.

Josephine Koush, Respondent, v. Joseph Ketzlik, Appellant. — Judgment affirmed, with costs. Opinion by Brady, J.

The Electrical Supply Company, Respondent, v. The Jersey City Electric Light Company, Appellant. — Judgment affirmed. Opinion by Davis, P. J.

William Morris, Appellant, v. Emily W. Emmons Respondent. — Judgment affirmed, with costs, and with liberty to plaintiff to reply. Opinion by Brady, J.

Jane H. Cowdrey, Executrix, etc., Appellant, v. Ambrose K. Ely, Executor, etc., Respondent. — Judgment affirmed. Opinion by Davis, P. J.

Levi M. Bates and others, Appellants, v. John C. McNulty, Respondent. — Judgment affirmed, with costs. Opinion by Daniels, J.

John Hancock Mutual Life Insurance Company, Respondent, v. Julius Loewenberg, Appellant. — Judgment affirmed, with costs. Opinion by Brady, J.

The People of the State of New York ex rel. Annie M. Hoffman v. The Board of Education, etc. — Proceedings affirmed, without costs. Opinion by Daniels, J.

Anna A. Baird, Appellant, v. Elizabeth M. Richardson and another, Respondents. — Judgment affirmed. Opinions by Brady, J., and Daniels, P. J.

In the Matter of Mary E. Hines. — Order modified as directed in opinion, and affirmed as modified, without costs to either party. Opinion by Davis, P. J.

James D. Brewster and others, Appellants, v. Walter T. Hatch and others, Respondents. — Judgment affirmed. Opinion by Davis, P. J.

The People of the State of New York, Respondent, v. John McGrath and Mary McGrath, Appellants. — Judgment reversed, new trial ordered.

Charles L. Waller, as Receiver, etc., Respondent, v. J. B. Pace Tobacco Company, Appellant. Order affirmed, with ten dollars costs and disbursements. Opinion by Daniels, J.

Minna De Kay, Appellant, v. Charles H. Bliss and others, Respondents. — Judgment modified as directed in opinion, and affirmed as modified, without costs. Opinion by Daniels, J.

Cornelius W. H. Eiding, Respondent, v. Charles W. Dayton, Appellant. — Order of reference affirmed, without costs, and motion to dismiss denied, without costs. Opinion *Per Curiam*.

John Hayes, Plaintiff, v. Catharine E. Rabold, Defendant. — Orders affirmed, with ten dollars costs and disbursements. Opinion by Davis, P. J.

Nathaniel Hooper and others, Respondents, v. Charles McC. Beecher and others, Appellants. — Judgment reversed, new trial ordered, costs to abide event. Opinion by Davis, P. J.

Henry Welsh, Respondent, v. John Taylor, Appellant. — Judgment reversed, new trial ordered, costs to appellant to abide event. Opinion by Davis, P. J.

Max Hoffman and others, Respondents, v. Isaac Steiman and others, Appellants. — Order reversed, without costs. Opinion by Davis, P. J.

Philip Deobold, Respondent, v. Frederick Oppermann, Appellant. — Judgment and order affirmed. Opinion by Daniels, J.

The People of the State of New York v. Matthew McInerney and another. — Judgment affirmed. Opinions by Davis, P. J., and Daniels, J.

The People of the State of New York ex rel. John T. Lockman, Respondent, v. James A. Flack, Appellant. — Order affirmed. Opinion by Brady, J.

Susan F. Platt, Plaintiff, v. Annie R. Platt and others, Defendants. — Orders affirmed. Opinion by Daniels, J.

Susan F. Platt, Plaintiff, v. Annie R. Platt and others, Defendants. — Order affirmed, with ten dollars costs and disbursements, and motion to dismiss appeal denied, without costs. Opinion by Daniels, J.

Benjamin C. Thayer, Appellant, v. John Dempsey, Respondent. — Order affirmed, with ten dollars costs and disbursements. Opinion *Per Curiam*.

The Continental National Bank of the City of New York, Respondent, v. Hermann Koehle, Appellant. — Judgment reversed, new trial ordered, costs to abide event. Opinion by Daniels, J.

Francis J. Byrne, Respondent, v. Maria L. Labagh and others, Appellants. — Order reversed, and order to be entered as directed in opinion. Opinion by Davis, P. J.

Frank B. Stearns, Appellant, v. St. Louis and San Francisco Railway Company. — Motion for reargument denied, with costs.

George W. Johnston v. Henry Spicer. — Motion denied.

National Thread Company, Appellant, v. Mansfield Silk and Thread Company, etc., Respondent. — Judgment reversed, new trial ordered, costs to abide event. Opinion by Davis, P. J.

The People of the State of New York, Respondents, v. Charles J. Everhardt, Appellant. — Judgment affirmed. Opinion by Davis, P. J.

Corn Exchange Bank, Appellant, v. Farmers' National Bank, Respondent. — Judgment affirmed, with costs. Opinion by Brady, J.

Richard S. Roberts and others, Appellants, v. Henry M. Graves, Respondent. — Judgment reversed, new trial ordered, costs to abide event. Opinion by Davis, P. J.

Jessup & Moore Paper Company, Respondents, v. William H. Cox and another, Appellants. — Judgment affirmed, with costs. Opinion by Brady, J.

Charles S. Stearns, Respondent, v. Jacob A. Sherman and another, Appellants. — Order modified as suggested in opinion, and as modified affirmed, without costs. Opinion by Davis, P. J.

Charlotte Meyer, Respondent, v. James P. Cahen and others, Appellants. — Judgment affirmed, with costs. Opinion by Brady, J.

In the matter of L. E. Chittenden, etc. — Order affirmed, with ten dollars costs and disbursements. Opinion by Macomber, J.

Martha W. Leach, Respondent, v. James A. Flack, Appellant. — Judgment reversed, new trial ordered, costs to abide event. Opinion by Daniels, J.

John L. Dodge, Appellant, v. James Havemeyer, Respondent. — Judgment affirmed. Opinion by Davis, P. J.

James R. Keene, Respondent, v. Elmore A. Kent and another, Appellants. — Order reversed and motion denied, with ten dollars costs and disbursements. Opinion by Daniels, J.

The Germania Life Insurance Company, v. James Meagher and others, Appellants. — Order affirmed, with ten dollars costs and disbursements. Opinion by Brady, J.

## FIRST DEPARTMENT, OCTOBER TERM, 1886.

- The People of the State of New York, Respondent, v. John C. Stoll, Appellant. — Judgment affirmed. Opinion by Davis, P. J.
- Paul Baner, Respondent, v. S. E. Schevitch and others, Appellants. — Order reversed and order of arrest set aside, unless within ten days after notice of decision the plaintiff obtain and file the undertaking directed by the opinion and pay the costs of opposing the motion and of appeal, in which case order affirmed. But in case of failure to comply with these conditions, order reversed and order of arrest vacated, with like costs. Opinion by Daniels, J.
- George C. Genet, as Executor, etc., Appellant, v. Mary R. Hunt and others, Respondent. — Judgment affirmed, with costs of appeal to all parties out of the fund. Opinion by Davis, P. J.
- Shepherd F. Knapp, as Receiver, Plaintiff, v. James Van Etten and others, Defendants. — Reargument ordered.
- In the Matter of Herman Duden. — Reargument denied.
- Heien A. Babcock and others, Appellants, v. Oliver M. Arkenburg, Respondent. — Order reversed, without costs. Opinion by Brady, J.
- Alfred A. Cohen, Respondent, v. John W. Ellis, Appellant. — Judgment reversed, and judgment entered as directed in opinion. Opinion by Daniels, J.
- John M. Burke, Respondent, v. the Mayor, etc., of the City of New York, Appellants. — Judgment affirmed, with costs. Opinion by Daniels, J.
- Joseph K. Murray, Respondent, v. Great Western Insurance Company. — Motion denied, without costs. Opinion by Daniels, J.
- Isaac Hamburger and another, Respondents, v. Rudolph Moeller, Appellants. — Order affirmed, with ten dollars costs and disbursements. Opinion by Daniels, J.
- David Levy and another, Respondents, v. Rudolph Moeller, Appellant. — Order affirmed, with ten dollars costs and disbursements. Opinion by Davis, P. J.
- Edith Storm and another, Respondents, v. Thomas Storm and others, Appellants. — Judgment affirmed, costs of all parties out of the fund. Opinion by Davis, P. J.
- Catharine Mendel, Respondent, v. Morris Mendel, Appellant. — Order reversed and motion denied, with ten dollars costs and disbursements. Opinions by Daniels, J., and Davis, P. J.
- William H. Sanger, Respondent, v. James M. Seymour, Appellant. — Order affirmed, with ten dollars costs and disbursements. Opinion by Daniels, J.
- Samuel Bingham and another, Respondents, v. the Marine National Bank, Appellant. — Motion for reargument denied. Opinions by Daniels and Brady, J. J., and by Davis, P. J., dissenting.
- Edward A. Morrison, Respondent, v. Moritz Bauer, Appellant. — Judgment modified as directed in opinion and affirmed as modified, without costs. Opinion by Daniels, J., and Davis, P. J.
- In the Matter of the Estate of John B. Page, deceased. — Order affirmed, with costs. Opinion by Daniels, J.
- James E. Brett, Appellant, v. Gustavus A. Brett and others, Respondents. — Judgment modified as suggested in opinion and affirmed as modified, without costs. Opinion by Brady, J.
- William C. Cowper, Appellant, v. Thomas Theall, Respondent. — Motion denied, with costs. Opinion by Daniels, J.
- John A. Kernochan, Appellant, v. Angeline A. Murray, Respondent. — Judgment affirmed. Opinion by Daniels, J., and Davis, P. J.
- Charles Wehrhane and others, Executors, etc., Appellants, v. The Nashville, Chattanooga and St. Louis Railway Company, Respondent. — Judgment reversed, new trial granted, costs to abide event. Opinion by Churchill, J.
- The Gallatin National Bank, Respondent, v. The Nashville, Chattanooga and St. Louis Railway Company, Appellants. — Judgment reversed, new trial granted, costs to abide event. Opinion by Churchill, J.
- Peter Bowe, Respondent, v. Robert C. Brown and others, Appellants. — Judgment and order modified as directed in opinion, and affirmed as modified, without costs. Opinion by Daniels, J.
- Henry Knickerbacker and others, Respondents, v. Charles W. Gould, Appellant. — Judgment affirmed, with costs. Opinion by Brady, J.

# I N D E X.

**ACCEPTANCE** — *Of a dedication.*  
See DEDICATION.

**ACCOMMODATION PAPER:**  
See BILLS AND NOTES.

**ACCOUNTING** — *Action against sureties upon a general guardian's bond — as to whether it should be brought in the name of the infant or of the guardian — when an action will lie against the sureties on the bond before an accounting has been had by the guardian.* PAGE.  
See PERKINS v. STIMMEL. . . . . 520

**ACTION** — *By the receiver of a corporation to determine the validity of bonds claimed to be secured by a mortgage on its property — when it can be maintained.]* 1. The plaintiff, who had been appointed the receiver of the Syracuse Iron Works, in an action brought for the sequestration of its property under section 1784 of the Code of Civil Procedure, brought this action in January, 1886, to determine which of the bonds which had been issued by the iron works were secured by a mortgage for \$100,000 issued by it, and which bonds should be excluded from sharing in the proceeds arising from the foreclosure of the mortgage; what bonds should be adjudged to belong to Charles B. Everson, which were not held by him, and what, if any, should be adjudged to be surrendered up by the present holders, and for such other relief as should be incident thereto.

In November, 1884, the trustee, to whom the mortgage was given, had commenced an action to foreclose it. In February, 1885, one Giles Everson had commenced an action in his own behalf, and in behalf of all the other stockholders of the company, to compel the application of the bonds to the purposes of the trust. The validity of the mortgage was not disputed by the plaintiff, but some of the bonds, which are claimed to be secured thereby, are alleged to be invalid and to have been diverted from the purposes for which they were given, and to have been used to pay debts not existing when the mortgage was executed and delivered.

*Held*, that the plaintiff, as the receiver of the corporation, was entitled to bring and maintain the action. HUBBELL v. SYRACUSE IRON WORKS. . . . . 182

2. — *To reach the surplus income of a trust fund — the habits and ability of the cestui que trust are to be considered in determining the amount to be allowed to him for his maintenance — the plaintiff must prove that there is a surplus.*

See KILROY v. WOOD. . . . . 636

3. — *For partition — a tenant, by the curtesy of an undivided share, may maintain it — Code of Civil Procedure, § 1532.*

See TILTON v. VAIL. . . . . 638

3. — *In what cases an action to restrain illegal acts will lie by a taxpayer under chapter 581 of 1881.*

See STARIN v. MAYOR, ETC. . . . . 549

— *Relating to municipal corporations.*

See MUNICIPAL CORPORATIONS.

— *Relating to corporations generally.*

See CORPORATIONS.

[Look under head of Subject-Matter thereof.]

**ADDITIONAL ALLOWANCE:**  
See COSTS.

**ADMEASUREMENT OF DOWER:***See* DOWER.**ADMINISTRATORS:***See* EXECUTORS AND ADMINISTRATORS.**ADMISSIONS — As evidence.***See* EVIDENCE.

PAGE.

**ADULTERY** — *Evidence — admissibility of the confession of a defendant in an action for adultery — a decree will be granted when all just reason to believe that collusion exists is removed.*

*See* MADGE v. MADGE..... 524

**ADVERSE POSSESSION** — *Landlord and tenant — when the possession of the tenant becomes adverse — Code of Civil Procedure, § 373 — after it has become adverse, a deed conveying the landlord's interest is void for champerty.*

*See* CHURCH v. SCHOONMAKER..... 235

— *Statute of limitations — Code of Civil Procedure, §§ 365, 368, 373 — when a possession will be deemed adverse.*

*See* HARBROUCK v. BURHANS..... 376**AGENT:***See* PRINCIPAL AND AGENT.

**ALBANY** — *Licenses for places of amusement — in Albany a discretionary power is vested in the Mayor — 1888 chap. 298, tit. 3, § 14, subs. 15, 20 — when its exercise will not be reviewed by the court.*

*See* PEOPLE EX REL. DORR v. THACHER.. 349**ALLOWANCE:***See* COSTS.**AMBIGUITY — Of covenants and conditions.***See* CONTRACTS.

**AMENDMENTS** — *Submission of a case upon agreed facts — Code of Civil Procedure, § 1279 — power of the court to amend the agreement as to the relief to be granted — when the power will not be exercised.*

*See* KINGSLAND v. MAYOR, ETC..... 599**AMUSEMENTS — Licensing places of.***See* LICENSERS.

**APPEAL** — *To the County Court from a justice's judgment.*] 1. Upon the appearance of the parties to this action before a justice upon the return of the summons, the plaintiff complained for a wrongful injury done to his horse by the defendant's horse, and demanded judgment for \$200. The defendant having answered by a general denial the case was adjourned to a future day, on which the plaintiff amended his complaint and claimed to recover as damages forty-nine dollars and costs. The defendant interposed an amended answer containing a counter-claim alleging that at the time and place mentioned in the complaint defendant, through the carelessness, recklessness and negligence of plaintiff in driving his, a vicious and unruly, horse ran into and collided with a horse belonging to the defendant, and that the defendant sustained damage in the sum of sixty dollars, for which sum he demanded judgment. The plaintiff having recovered a judgment for forty-nine dollars, with costs, the defendant appealed to the County Court, and in the notice of appeal demanded a new trial.

*Held*, that the County Court erred in denying a motion made by the plaintiff to have the case put on the law calendar for hearing as an appeal on the law. HINKLEY v. TROY AND ALBIA R. R. Co..... 281

2. — *What counter-claim cannot be pleaded in an action of tort.*] That as the cause of action stated in the complaint admitted of no counter-claim in tort, unless it were alleged to grow out of or was connected with the transaction set forth in the complaint as the foundation of the plaintiff's claim,



**APPEAL — Continued.**

PAGE.

which was not alleged in the answer, that the right to a new trial was to be determined by the amount demanded in the complaint, and not by the amount of the alleged counter-claim set up in the answer. *Id.*

3. — *The right to a new trial is determined by the amount demanded in the amended, and not by that asked for in the original pleadings.*] That the question was to be decided by the amount demanded in the amended complaint, and not by that demanded by the first complaint. *Id.*

4. — *When an amount\* exceeding fifty dollars claimed thereby will not justify a new trial on appeal.*] That even if the counter-claim were admissible it should be held to be either sham, because no evidence was offered to support it, or to be an answer upon which the defendant had voluntarily suffered default. *Id.*

5. — *Motion to dismiss an appeal to the County Court because of a failure of the sureties upon an undertaking to justify.*] On July 23, 1885, a notice of appeal from a judgment recovered by the plaintiff in a Justice's Court, was duly served and the undertaking required by section 30.9 of the Code of Civil Procedure, was executed and filed with the justice, but no copy of the undertaking was served upon the respondents, nor was any notice of the filing thereof. On August eighteenth the attorneys for the respondents served a notice of retainer, and August thirty-first a notice excepting to the sureties upon the undertaking. On the twentieth of November they served a notice of trial, and on the twenty-fifth of November a notice of a motion to dismiss the appeal upon the ground that the appellant's sureties had failed to justify and that no new undertaking had been executed and filed.

*Held*, that a claim that the motion should be denied upon the ground that the respondents did not except to the sureties within the ten days provided by the Code, was properly overruled as no copy of the undertaking, or notice of the filing thereof, was served upon the respondents, and they first learned that the undertaking had been filed on August 24, 1885.

SLATTERY v. HASKIN..... 86

6. — *The right to so move, is not lost by the service of a notice of retainer or of trial.*] That neither the service of the notice of retainer nor of the notice of trial operated as a waiver of the right of the respondents to move to dismiss the appeal. *Id.*

7. — *Order granting a new trial, after a conviction of a crime, upon the ground of newly discovered evidence — the people cannot appeal therefrom.*] The defendant having been tried and convicted of murder in the first degree, the judgment and conviction were, upon an appeal taken by him, affirmed by the General Term and the Court of Appeals. Thereafter, upon the motion of the defendant, an order was made, under subdivision 7 of section 465 of the Code of Criminal Procedure, granting a new trial upon the ground of newly discovered evidence. Upon the hearing of an appeal taken by the people from this order to the General Term.

*Held*, that the appeal should be dismissed, as no appeal by the people from such an order was authorized. PEOPLE v. BECKWITH..... 366

— *Offer of judgment on appeal from a judgment in a Justice's Court — right of the party accepting it to costs — Code of Civil Procedure, § 8070.*

See HOLLENBACK v. KNAPP..... 207

— *When a fine for indemnity for a contempt imposed under section 2281 of the Code of Civil Procedure cannot be changed on appeal to a fine for punishment — proper order to be entered in such cases*

See FALL BROOK COAL CO. v. HECKSHER..... 584

— *Power of the court to order a reference to take testimony as to facts and to refuse to enter an interlocutory judgment — such an order is appealable — Code of Civil Procedure, § 1847, sub. 4.*

See CENTRAL TRUST CO. v. N. Y. CITY AND NORTHERN RY. CO.... 603

— *Reference of a disputed claim against the estate of a deceased person is a special proceeding — an appeal should be taken from the order of the Special Term confirming the referee's report, and not from the judgment.*

See HATCH v. STEWART..... 164

**APPEAL — Continued.**

PAGE.

— *Surrogate — order opening decree — how reviewed — Code of Civil Procedure, § 2481, sub. 6.*

*See* PEOPLE EX REL. STEVENS v. LOTT..... 408

*See* CERTIORARI.

*See* NEW TRIAL.

**ASSESSMENT — For the purposes of general taxation.**

*See* TAXES.

**ASSIGNMENT** — *Right of one partner to transfer firm property, in consideration of an agreement by the purchaser to pay a certain percentage upon the firm debts.* 1. The firm of Burrows & Lane having become insolvent, and Lane having absconded, a meeting of their creditors was held at which the property and liabilities of the firm were examined and ascertained. Upon the recommendation of all the creditors, except the plaintiff, the defendant Burrows executed an assignment of all the firm property to the defendant Potts, and in consideration thereof the said Potts agreed to pay each of the creditors of the said firm forty per cent of the indebtedness of each creditor in full for such debt, and to accept the said assignment in full of his own claim, amounting to over \$18,000. Potts subsequently paid to each creditor forty per cent of his claim according to the agreement, except that he did not pay the plaintiff for the reason that he would not receive it.

The plaintiff having recovered a judgment, and issued an execution thereon, which was returned unsatisfied, brought this action, in which he claimed that the sale was fraudulent as against the creditors of the firm.

*Held*, that the legal effect of the sale of the firm property to Potts, in view of the purpose and consideration, was not such as to charge the parties so it with the intent to hinder and delay the plaintiff in the collection of his debt, and thus render it fraudulent as against him.

CHADWICK v. BURROWS.....

39

2. — *When it will be sustained as against objecting creditors.* That the provision of the agreement, to the effect that Potts should pay "to each of the creditors of the said firm of Burrows & Lane forty per cent of the indebtedness of each creditor in full of such debt," was to be construed as applicable only to those creditors who consented to adopt the same and be bound thereby, and that any creditor who did not agree to be bound thereby was entitled to collect from Potts forty per cent of the amount of his claim, to be applied in satisfaction thereof to that extent and no further. *Id.*

3. — *A condition that the amount to be paid shall be received in full of the debt would invalidate it.* It seems, that if the right of the creditors to receive the amounts specified in the assignment had been made to depend upon the condition that they should discharge the entire debt due to them on receipt of the prescribed rate of forty per cent of their respective demands, it would have been held to be a stipulation for the advantage of the assignor which would have rendered the assignment invalid. *Id.*

4. — *Proper relief.* That as the complaint contained allegations which would have permitted the Special Term to treat the case as within the statute, providing for creditors' actions not resting upon fraudulent dispositions of property, and to grant the appropriate relief, the judgment should be so modified as to direct the payment by the defendant Potts to the plaintiff of the forty per cent, the purchase-price of the firm property, which he undertook to pay on account of the debt due to the plaintiff. *Id.*

5. — *General assignment by partners — when it includes individual as well as partnership property.* In January, 1870, "Peter W. Bain and William H. Bain, copartners, doing business under the firm name of P. W. Bain & Son," executed a general assignment to V. H. Youngman, which, after reciting that the parties of the first part are indebted, etc., proceeded to state that the parties of the first part do grant, assign and transfer to the party of the second part all and singular the real and personal estate of the parties of the first part in trust to sell, and with the net proceeds pay, first all the debts of the parties of the first part, as such copartners, and second all the private and individual debts of the parties of the first part, provided the res-

**ASSIGNMENT — Continued.**

PAGE.

pective amounts of the individual debts of each of the said parties does not exceed his portion of the surplus, provision being made that no part of the surplus due one partner shall be applied in payment of the debts of the other.

*Held*, that the assignment contemplated the appropriation of all the partnership and individual property of each partner, first, to the payment of the partnership debts, and, second, the surplus, if any, due each partner, to the payment of his individual debts. *BECKER v. LEONARD*..... 221

6. — *Right of the partners to pay out of their individual property partnership, in preference to individual creditors.*] That it was not made fraudulent against the individual creditors of either partner, because his individual property was appropriated to pay partnership debts, as each individual partner is individually liable for partnership debts, and so long as he has the disposing power over his individual property he can apply it to that purpose. *Id.*

7. — *When the right to recover property fraudulently transferred by an assignor passes to the assignee.*] This action was brought by the plaintiff, who had recovered, in December, 1878, a judgment upon an individual indebtedness of Peter W. Bain, existing prior to the assignment, to recover money placed in the hands of the defendant by Peter W. Bain, at the time the assignment was made, in order that it might be withheld from his creditors. The defendant paid the money to the assignee in August, 1878.

*Held*, that the action could not be maintained, as the fund in the hands of the defendant passed to the assignee by the assignment.

That the assignee was not a necessary party to this action. *Id.*

8. — *General assignment — firm creditors may be preferred to individual creditors.*] This action was brought by the plaintiff, as a judgment creditor of the defendant Brooks, to set aside, as fraudulent, a general assignment made on March 8, 1884, by the defendant Brooks as the surviving partner of a firm composed of himself and one Edward Brooks, who died in September, 1883. The assignment, which contained preferences, included so much of the partnership stock as still remained undisposed of and such further goods as the assignor himself had purchased and added to the stock, during this intervening period, which still remained unsold.

*Held*, that an objection to the validity of the assignment, on the ground that the assignor could not devote his own individual property to the payment of debts owing by the firm, of which he had been a member, could not be sustained. *HAYNES v. BROOKS*..... 528

9. — *The surviving partner may make a general assignment.*] That the assignor, as surviving partner of the firm, had authority to make it and to include therein the property of the preceding firm. *Id.*

10. — *Debts contracted by a surviving partner are his individual debts.*] After providing for the payment of the preferred debts, the assignor directed that the assignee should pay and discharge the other debts owing by the firm of John I. Brooks & Co., or against the assignor, as the survivor thereof.

*Held*, that an objection that the assignment did not provide for the payment of the individual debts of the assignor, was not well founded, as, whatever debts were contracted by him since the dissolution of the firm were his individual debts, and describing himself as the survivor of the firm did not change their character or affect his liability upon them. *Id.*

11. — *Fraudulent assignment — it must be set aside if any part thereof was made with intent to defraud*] A general assignment, transferring the property of a firm for the purposes of paying the individual debts of the partners, as well as the firm debts, is wholly void as to firm creditors, and must be set aside.

It cannot be sustained, in so far as it transfers the firm property to pay firm debts, and set aside as to that portion which provides for the payment of the individual debts. *NATIONAL BANK OF GRANVILLE v. COHN*..... 381

— *Action of replevin to recover goods fraudulently obtained — an assignee for the benefit of creditors cannot object to the failure of the plaintiff to make a tender to the assignor.*

*See SCHOONMAKER v. KELLY*..... 209

**ASSIGNMENT — Continued.**

PAGE.

— *Action to compel an accounting by a general assignee — right of other creditors to come in after judgment and prove their claims — they cannot be compelled to contribute their share of the costs and expenses — costs and expenses of plaintiff, how paid.*

See *MATTER OF LEWIS v. HAKE* ..... 542

— *Place of trial of an action to set aside as fraudulent a general assignment covering real estate — the right to demand a change of venue cannot be defeated by an offer by the plaintiff to stipulate not to attempt to reach the real estate.*

See *WYATT v. BROOKS* ..... 502

— *Set-off — when allowed in equity as against an assignee, where the debt sought to be set-off was not due at the time of the making of a general assignment by the insolvent debtor.*

See *ROTHSCHILD v. MACK* ..... 72

**ASSOCIATIONS** — *Mutual benefit association — suicide is not a violation, or an attempt to violate a criminal law — duty of a corporation to make an assessment to pay death claims — when a report made to the insurance department is admissible in evidence against the association — the person receiving the amount need not have an insurable interest in the life of the member.*

See *FREEMAN v. NATIONAL BENEFIT SOCIETY* ..... 252

— *Change in the disposition of money to be received on the death of a member of a lodge — the transfer must be made in the form prescribed by the by laws of the lodge.*

See *IRELAND v. IRELAND* ..... 212

See **CORPORATIONS.**

**INSURANCE.**

**ATTACHMENT** — *Levy upon property under an attachment — right of the sheriff to deny the defendant's title to the property in an action for a false return brought by the plaintiff in the attachment suit.* 1. In an action, brought against the Gibbs & Sterritt Manufacturing Company, an attachment was issued and delivered to a deputy sheriff, who, at the request of the plaintiff's attorney, seized and levied upon certain property which had, prior to that time, been levied upon by the sheriff under attachments issued in other actions brought against the firm of Humphrey & Aspinwal. The deputy thereafter made the customary inventory and filed a return in the clerk's office. Thereafter, under executions issued upon judgments recovered in the aforesaid actions brought against the firm of Humphrey & Aspinwal, and an execution issued upon a judgment subsequently recovered by the plaintiff in his action against the Gibbs & Sterritt Manufacturing Company, the sheriff sold the property attached, as directed in the executions, and applied the proceeds upon the judgments recovered against the firm of Humphrey & Aspinwal, returning the plaintiff's execution *nulla bona*.

Upon the trial of this action, brought by the plaintiff to recover the moneys which he alleged the defendant, as sheriff, had collected on its execution, it appeared that the property was, prior to November 14, 1882, owned by the said manufacturing company, and in the possession of the said firm, as its agents for selling its goods, each of the partners being a trustee of the company; that on that day the property was sold to the said firm, and remained thereafter in its possession until levied upon by the sheriff.

*Held*, that the fact that the deputy sheriff had seized certain items of property, as property owned by the defendant in the attachment suit, and had made and filed a return, did not estop the sheriff from showing, when sued for making a false return, that the property attached belonged to a third person; that it did, however, cast upon him the burden of proving that the property did not belong to the defendant. *THIRD NAT. BANK v. ELLIOTT*, 121

2. — *When a sale of the property of an insolvent company will be held void.* That in this case the sheriff had failed to establish the fact that the property did not belong to the Gibbs & Sterritt Manufacturing Company that the court properly held the sale of November 14, 1882, to be void as a matter of law, as it was shown that the sale was made at a time when the company was insolvent by the members of its executive committee to two of its own

**ATTACHMENT — Continued.**

PAGE.

trustees, who had knowledge of the insolvency of the company, and received the property in payment of a debt much less in amount than the value of the property. *Id.*

8. — *Practice — power of the court to allow additional affidavits to be read on a motion to vacate an attachment — to order such affidavits to be filed nunc pro tunc.* Upon the hearing of a motion to vacate an attachment, made by the defendant upon the papers upon which it was granted, the plaintiff was allowed, without objection on the part of the defendant, to read two additional affidavits establishing the non-residence of the defendant and the plaintiff's inability to serve him within the State. Thereupon, an order was made permitting the plaintiff, on paying ten dollars to the defendant, to amend his proceedings by filing the said affidavits, as of the date of the issue of the attachments, and amending the former order and other proceedings so as to conform thereto, and directing that if this were done the motions were denied, but if not done, they were granted, with ten dollars costs. The ten dollars were immediately paid to the defendant's attorney, who at first accepted the money but offered, a few days later, to return it to the plaintiff's attorney, who refused to receive it. Upon an appeal by the defendant from so much of the order as allowed the plaintiff to amend his proceedings by filing the additional affidavits *nunc pro tunc*:

*Held*, that as it did not appear that the defendant objected to the reading of the affidavits at the Special Term, he would not be allowed to take exception thereto, in the first instance, on appeal.

That section 724 of the Code of Civil Procedure conferred upon the court power, in its discretion, to allow such an amendment of the proceedings.

FISHER v. DOUGHERTY..... 167

4. — *A party accepting a payment under an order cannot thereafter object to such order.* [That the defendant having accepted the money paid by the plaintiff, in compliance with the terms of the order now appealed from, ought not now to be allowed to complain of the course the discretion of the court took. *Id.*

5. — *Practice — motion to vacate an attachment — when it may be made after the denial of a previous motion therefor — Code of Civil Procedure, § 683* Under the provisions of section 683 of the Code of Civil Procedure an interested party may, as a matter of right, move to dismiss an attachment granted upon the ground that the defendants had disposed of their property with an intent to defraud their creditors, upon affidavits disproving or explaining the case made by the plaintiffs, although a motion to vacate the attachment, founded upon the papers used by the plaintiff in procuring it, has already been made and denied. THALHEIMER v. HAYS..... 93

— *Enforcement of a direction in an order requiring costs or money to be paid to any person — the remedy is by execution and not by attachment — Code of Civil Procedure, § 779.*

See FORSTMAN v. SCHULTING..... 643

**ATTORNEY AND CLIENT — Evidence — statements of third persons, when inadmissible as evidence against a party — right of an attorney to purchase a judgment in order to enforce the lien thereof on real estate — Code of Civil Procedure, § 73.** 1. This action was brought to have a judgment which had been assigned to the plaintiff declared a lien upon certain land conveyed to the defendant Hebbard by the judgment debtor, upon the ground that the conveyance was made to secure a debt, which the plaintiff asked to be allowed to pay off, in order that he might have the land sold under his judgment. One of the defenses to the action was that the judgment had been bought and paid for by one Thomas, the attorney for the plaintiff in the suit in which it was recovered, and that the title was taken in the name of the plaintiff, a clerk and stenographer in the attorney's office, for the purpose of bringing a suit thereon for Thomas' benefit.

*Held*, that even if Thomas had purchased the judgment for the mere purpose of establishing and enforcing a lien upon the property conveyed to the defendant, such purchase did not fall within the prohibition of section 73 of the Code of Civil Procedure, prohibiting such purchase by an attorney, with the intent and for the purpose of bringing an action thereon.

FAY v. HEBBARD..... 490

**ATTORNEY AND CLIENT — Continued.**

PAGE.

2. — *Loan of an attorney upon moneys collected under a judgment — when he may retain therefrom the amount due to him for services rendered in other proceedings.*] Upon an appeal from an order directing a reference to take proof and report how much of a sum of \$9,818.35 an attorney was entitled to retain as compensation for his services in an action, it appeared that the action in which the money was collected was prosecuted under an agreement entered into between himself and the plaintiff, by which the latter agreed, in lieu of paying fees, that the attorney should prosecute that and other suits for one-fourth of the net amounts which should be recovered on the judgments. In addition to the one-fourth which he was by the agreement entitled to retain, the attorney claimed to retain the residue upon the ground that he had been employed in other legal proceedings, and had rendered services and made disbursements in them for the plaintiff, and also that the plaintiff had violated his agreement with the attorney concerning legal proceedings in other actions covered by the agreement, and thereby rendered himself liable for the damages which the attorney had sustained.

*Held*, that the attorney had no right to reserve or retain the said moneys to secure the payment of any damages arising out of the failure of the plaintiff to perform his contract, but that he was entitled to retain the amount due to him for the services performed and the disbursements made in the legal proceedings for which he had not already been compensated.

MATTER OF LORILLARD v. BARNARD..... 545

— *Cashier of a bank — he may employ an attorney to collect a claim without any resolution of the board of directors, although that board has appointed an attorney and counsel to attend to its legal affairs.*

See ROOT v. MARTIN..... 536

— *Evidence — admissibility of the testimony of counsel as to communications had with a deceased person whose will he drew — Code of Civil Procedure, §§ 835, 836.*

See MATTER OF AUSTIN..... 516

**BANKING** — *Certificate of deposit — when a promise to pay will be implied therefrom.*] 1. On December 5, 1882, the defendant, a private banker, discounted a note for \$3,500, made by Knox Brothers to, and indorsed by Sliney & Whelan, upon the oral understanding that the proceeds should not be paid until the fifteenth of the month. The defendant's cashier then gave to Sliney & Whelan an instrument in the following form: "Deposited by Sliney & Whelan with Judson H. Clark, banker, Scio, N. Y., December 5, 1882; discount, \$3,412.50." On the same day this instrument was delivered by Sliney & Whelan to the plaintiff, at its bank, with a check for \$3,412.50, drawn by them upon the defendant, payable to their own order ten days after date, and indorsed by them, the plaintiff then paying to them that amount, less interest for thirteen days. Knox Brothers and Sliney & Whelan having failed before December fifteenth, and the defendant having failed to pay the amount named in the instrument to the plaintiff, this action was brought to recover the same.

*Held*, that the certificate *prima facie* represented an undertaking on the part of the defendant to pay the sum mentioned in it to the depositors on demand, and that a transfer of the certificate would transfer all the right possessed by the depositors against the defendant in respect to the deposit.

FIRST NATIONAL BANK v. CLARK..... 16

2. — *What facts establish a transfer thereof.*] That even if this were not so, yet as the evidence produced upon the trial was sufficient to enable the jury to find that the intention of the parties to the transaction was to effect a transfer of the claim against the defendant, from Sliney & Whelan to the plaintiff, and that this transfer was made, the court erred in directing a nonsuit upon the ground that the plaintiff had failed to show an assignment of the claim. *Id.*

3. — *Cashier of a bank — he may employ an attorney to collect a claim without any resolution of the board of directors, although that board has appointed an attorney and counsel to attend to its legal affairs.*] Upon the trial of this action brought to recover, from the receiver of the Wall Street Bank, a sum claimed

**BANKING — Continued.**

PAGE.

to be due for services rendered by the plaintiffs, as counselors-at-law, it appeared that the cashier of the bank had, without any resolution of the board of directors, and without the knowledge of any of the officers of the bank, retained the plaintiffs to collect certain claims, and that the plaintiffs, under this retainer, rendered services and made disbursements; that in many matters they acted under the direction of the general counsel of the bank, who, it appeared, were to some extent authorized to control the movements of the plaintiffs, and who ultimately took upon themselves the management of these claims as well as of the other affairs of the bank.

*Held*, that the act was within the scope of the general authority of the cashier, and that he was authorized, without any formal vote of the board of directors, to employ attorneys to collect the claim. (Per BRADY and DANIELS, JJ.; DAVIS, P. J., dissenting, upon the ground that where the bank has its duly authorized attorney and counsel, appointed by the board of directors, to take charge of its land, business and affairs, the cashier has no general authority which empowers him to retain other attorneys or counsel for the bank at his discretion or pleasure.) *ROOT v. MARTIN*..... 536

— *Over-drawing of his account, by a bank officer — what must be shown to justify his conviction under section 600 of the Penal Code.*

See *PEOPLE v. CLEMENTS*..... 286

See *BILLS AND NOTES*.

**BANKRUPTCY — Sale by assignees in bankruptcy under the United States Statute, chapter 9 of 1841 — power of the court to order a private sale without specifying the time thereof.** [Section 9 of the bankrupt act of 1841, providing that all sales by assignees "shall be made at such times and in such manner as shall be ordered and appointed by the court," was intended to apply to public sales only, and not to a private sale ordered by the court.

*GIGNOUX v. STAFFORD*..... 426

**BILLS AND NOTES — Diversion of a promissory note from the use to which it was to have been applied — when that fact may be set up by the maker as a defense to an action brought by a transferee of the note, receiving the same as collateral to a pre-existing indebtedness.** [1. In this action brought upon a promissory note given by the defendant to one John D. Taylor, and transferred to the plaintiffs before maturity, the defendant set up, as a separate defense, that Taylor being indebted to one Shaw in the sum of \$150 for services rendered, in obtaining the contract for the doing of the work which furnished the consideration of the note, applied to the defendant before the last payment was due for notes amounting to \$250; that the defendant had agreed to satisfy and pay the claim of Shaw out of the proceeds of the last payment, and she refused to give the notes; that then Taylor promised that if two notes, one for \$100 and the other for \$150 were given, he would deliver the \$150 note to Shaw in payment; that thereupon the \$150 note was made and delivered; that Taylor diverted this \$150 note from the purpose for which it was made; that no consideration or value was given for the note by the plaintiffs, who received the same as collateral and in consideration of an antecedent indebtedness of Taylor to them.

*Held*, that the facts so set up established a defense, and that a demurrer interposed thereto by the plaintiffs was properly overruled.

*AYRES v. DOYING*..... 630

2. — *Accommodation indorser — when he cannot compel the guarantor of a note to contribute.* [G. H. Plato, the defendant's son, offered a note made by himself and indorsed for his accommodation by the plaintiff, to one Olney in payment of an indebtedness due to him. Olney having refused to accept it unless the defendant's signature was procured, the defendant, with full knowledge of the facts, executed on the back of the note, above the plaintiff's signature, an absolute guaranty of the payment of the note. The note was delivered to Olney. The plaintiff had no knowledge of or participation in the procuring of the defendant's guaranty. The plaintiff, having been compelled to pay the note, brought this action against the defendant as a guarantor, claiming that she, as a co-surety for the principal debtor, G. H.

**BILLS AND NOTES — Continued.**

PAGE.

Plato, who was insolvent, was liable to contribute one-half of the amount the plaintiff had been compelled to pay.

*Held*, that the action could not be maintained. **PHILLIPS v. PLATO**..... 189  
See **BANKING**.

**BOARDS — Of city officers.**

See **MUNICIPAL CORPORATIONS**.

**BOND — Undertaking to secure a return of chattels — form of — Code of Civil Procedure, §§ 1698, 1704.]** 1. Under an attachment, issued in this action brought to recover the possession of a large number of articles, the sheriff took possession of a part or all of the articles. The defendant, to entitle himself to require a return of so much of the property as had been seized by the sheriff, presented an undertaking, executed by himself and two sureties, in a sum double the actual value of all the property, as it was stated in the affidavit made by the plaintiff, which recited that the plaintiff had caused a part only of the property to be replevied, and that the defendant, executing or giving the undertaking, required a return to him of the part of the chattels so replevied.

*Held*, that although this recital should not have been inserted in the undertaking the plaintiff was not prejudiced thereby, as it did not, in any way, qualify or diminish the liability of the persons executing it to respond for the value of all the chattels, the return of which might be secured by means of the undertaking.

**WEBER v. MAUNE**..... 557

2. — *Of a marshal of the city of New York — a party aggrieved cannot, under an order of a justice of the Court of Common Pleas, prosecute it in the Supreme Court — 1862, chap. 484.]* An order permitting a person aggrieved by any official misconduct on the part of any marshal of the city of New York to prosecute the bond which the marshal is required, by chapter 484 of 1862, to give to the mayor, aldermen and commonalty of the city of New York, can only be made by a justice of the Court of Common Pleas, as is prescribed in section 7 of the said act, and his jurisdiction being a special and limited one, is restricted to the form of order prescribed by that act.

An order granting leave to prosecute the bond, in the name of the plaintiff, in the Supreme Court, instead of directing it to be prosecuted in one of the district courts of the city of New York, or in the Marine Court of that city, is not authorized by the act and cannot be sustained.

**MOOG v. KEHOE**..... 494

— *When a condition of a bond will be treated as an agreement — when specific performance thereof will be enforced — presumption as to an instrument having been under seal — what consideration will support an agreement — the court will not direct specific performance where a party is unable to perform his contract.*

See **MARTIN v. COMBY**..... 1

— *Bond of a deputy sheriff for the faithful discharge of his duties — the sureties thereon are bound only for acts done after its delivery — the presumption of its delivery upon the day of its date is destroyed by proof of the time of its actual delivery.*

See **RILEY v. DODGE**..... 646

— *Defects in a constable's bond — 1 R. S. 846, § 21, as amended by chap. 788 of 1872 — until removed the constable's acts are to be treated as those of an officer de jure as to third persons.*

See **ADAMS v. TATOR**..... 384

— *Tax collector — effect of his failure to give a bond, as required by section 24 of chapter 567 of 1875 — when his acts done under the warrant are rendered valid by the subsequent giving of the bond.*

See **DUNTLEY v. DAVIS**..... 329

— *Action against sureties upon a general guardian's bond — as to whether it should be brought in the name of the infant or of the guardian — when an action will lie against the sureties on the bond before an accounting has been had by the guardian.*

See **PERKINS v. STIMMEL**..... 520



**BOND — Continued.**

PAGE.

— *Right of one, not a party to it, to enforce an agreement by the obligor to pay a debt due to the claimant from the obligee's ancestor.*

See *PULVER v. SKINNER*..... 823

**BOOKS AND PAPERS — Inspection of.**

See *DISCOVERY*.

**BROOKLYN** — *Dismissal of members of the police force of Brooklyn — 1878, chapter 863, section 14, title 11, as amended by chapter 457 of 1881.] Certiorari to review the action of the respondent, the Police Commissioner of the City of Brooklyn, in dismissing the relator, a member of the police department of that city, upon a charge of an unprovoked assault upon a citizen while the relator was off duty.*

*Held*, that the relator was properly dismissed for a violation of rules of the department, which provided that the policemen should be at all times subject to its rules, and prohibited any policeman from wilfully abusing or ill-treating a citizen. *PEOPLE EX REL. HAYES v. CARROLL*..... 438

**BURDEN OF PROOF :**

See *EVIDENCE*.

**BY-LAWS — Of a corporation.**

See *CORPORATIONS*.

**CANAL** — *Eminent domain — right of the State to acquire the fee in lands to be used for a canal — of its right to authorize such lands to be used by a city as a public street — 1 R. S., 225, 226, §§ 46, 52 — 1878, chap. 391.*

See *ELDRIDGE v. CITY OF BINGHAMTON*..... 202

**CARRIERS:**

See *CORPORATIONS*.

*RAILROADS*.

**CASE — Submitted upon agreed facts.**

See *PRACTICE*.

**CASHIER — Of a bank — implied power of, to employ an attorney.**

See *BANKING*.

**CERTIFICATE — That the stock of a corporation is paid in full.**

See *CORPORATIONS*.

**CERTIFICATE OF DEPOSIT :**

See *BANKING*.

**CERTIFICATE OF INDEBTEDNESS — By a receiver.**

See *CORPORATIONS*.

**CERTIORARI** — *Assessment of the expenses of the railroad commissioners on railroad companies — the State officers, in so doing, act judicially — their action may be reviewed on certiorari.*

See *PEOPLE EX REL. N. Y. AND O. W. R. Co. v. CHAPIN*..... 239

— *Power of the court to correct erroneous assessments on the hearing of a certiorari to review them — Code of Civil Procedure, § 2141.*

See *PEOPLE EX REL. NEUSTADT v. COLEMAN*..... 581

**CHARACTER — Evidence as to.**

See *EVIDENCE*.

**CHARGE** — *Error in the charge of the court as to the measure of damages — an exception thereto will not be sustained, when the charge was based upon a fact the existence of which was assumed by the court and both parties upon the trial.*

See *VAIL v. REYNOLDS*..... 647

— *Of legacies upon land.*

See *WILL*.

*LEGACIES*.

**CHAMPERTY** — *Landlord and tenant — when the possession of the tenant becomes adverse — Code of Civil Procedure, § 878 — after it has become adverse, a deed conveying the landlord's interest is void for champerty.*

*See* CHURCH *v.* SCHOONMAKER..... 225

**CHATTEL MORTGAGE:**

*See* MORTGAGE.

**CHATTELS:**

*See* PERSONAL PROPERTY.

— *Sale of.*

*See* SALES.

**CHIEF FISCAL OFFICER:**

*See* MUNICIPAL CORPORATION.

**CHILD:**

*See* INFANT.

**CHURCH:**

*See* RELIGIOUS SOCIETIES.

**CITY:**

*See* MUNICIPAL CORPORATIONS.

[Look under name of particular city.]

**CIVIL DAMAGE ACT** — *What evidence will support a verdict that a suicide resulted from intoxication.*] 1 Upon the trial of this action, brought under the civil damage act to recover damages sustained by reason of the plaintiff's husband having committed suicide while intoxicated, evidence was given tending to show that after playing cards and drinking in the defendant's saloon he arrived at home at about twenty minutes to eleven, very much intoxicated; that the plaintiff, after attempting to quiet him, took her baby and went up stairs, leaving her husband below, it not being an unusual thing for him to sleep down stairs. In the morning he was found hanging by the side of the closet door, having evidently committed suicide. The deceased was the father of ten children, the youngest but a few weeks old. He was addicted to strong drink, but made a comfortable living for his family. He had formerly attempted suicide, but whether or not, at the time of making such attempt, he was sober or otherwise did not appear. A paper was found containing the words "give my watch to my boy," and stating that his brother-in-law owed him fifty-seven dollars.

*Held*, that a verdict finding that the suicide was the result of the intoxication would not be set aside by the appellate court. *BLATZ v. ROHRBACH*.. 403

2. — 1878, *chap. 646 — when exemplary damages may be recovered against the lessor.*] Where, in an action under the civil damage act, brought against the lessor of the premises and the lessee who sold the liquor, jointly, a case is made which authorizes the recovery of exemplary damages, as against the lessee and seller of the liquor, such damages may also be recovered from the lessor, although they could not have been so recovered if the action had been brought against him alone.

*See* REID *v.* TERWILLIGER..... 310

**CIVIL RIGHTS** — *An owner of a skating rink refusing to sell tickets to a colored person is guilty of a misdemeanor — Penal Code, § 883.*] Upon the trial of the defendant, one of the owners of a skating rink, upon an indictment charging him with a misdemeanor in refusing to sell to three colored persons tickets of admission on a certain evening when a large number of persons were admitted thereto for the purposes of amusement and as spectators, he was convicted and sentenced to pay a fine of \$ 50.

*Held*, that the judgment should be affirmed; that the skating rink was "a place of amusement" within the meaning of that term as used in section 283 of the Penal Code, and that that section was constitutional.

*See* PEOPLE *v.* KING..... 186

**CODE OF PROCEDURE**—§§ 297, 298—*Receiver in supplementary proceedings—power conferred by these sections of the Code of Civil Procedure, upon the judge acting in such proceedings to order any property of the judgment debtor not exempt from execution to be applied towards the satisfaction of the judgment, ceased upon the repeal of said sections by chap. 417 of 1877.*

See SMITH v. TOZER..... 22

—§ 317—*Reference of a disputed claim against the estate of a deceased person, is a special proceeding—an appeal should be taken from the order of the Special Term confirming the referee's report, and not from the judgment—the plaintiff is entitled to recover his disbursements, as a matter of right, under this section of the Code of Procedure which was not repealed by chap. 417 of 1877.*

See HATCH v. STEWART..... 161

See table of sections of the Code of Procedure cited, *ante*, in this volume.]

**CODE OF CIVIL PROCEDURE**—§ 78—*Right of an attorney to purchase a judgment in order to enforce the lien thereof on real estate.*

See FAY v. HEBBARD..... 490

—§§ 365, 369, 378—*Statute of limitations—when a possession will be deemed adverse.*

See HASBROUCK v. BURHANS..... 376

—§ 373—*Landlord and tenant—when the possession of the tenant becomes adverse—after it has become adverse a deed conveying the landlord's interest is void for champerty.*

See CHURCH v. SCHOONMAKER..... 225

—§ 683—*Motion to vacate an attachment—when it may be made after the denial of a previous motion therefor.*

See THALHEIMER v. HAYS..... 93

—§ 724—*Power of the court to allow additional affidavits to be read on a motion to vacate an attachment.*

See FISHER v. DOUGHERTY..... 167

—§ 779—*Practice—enforcement of a direction in an order requiring costs or money to be paid to any person—the remedy is by execution and not by attachment.*

See FORSTMAN v. SCHULTING..... 643

—§ 829—*Evidence—when the testimony of a party interested in the result is inadmissible.*

See HILL v. WOOLSEY..... 482

—§ 839—*Evidence—when the execution and delivery of a mutual agreement is a personal transaction within the meaning of this section of the Code of Civil Procedure.*

See CHAFFEE v. GODDARD..... 147

—§ 829—*Evidence as to personal transactions with a deceased person—to what cases the prohibition does not extend.*

See BLAESI v. BLAESI..... 159

—§§ 835, 836—*Admissibility of the testimony of counsel as to communications had with a deceased person whose will he drew.*

See MATTER OF AUSTIN..... 516

—§ 999—*A motion for a new trial on the minutes of the justice can only be made when a verdict has been rendered.*

See FIRST NAT. BANK v. CLARK..... 90

—§ 1279—*Submission of a case upon agreed facts—power of the court to amend the agreement as to the relief to be granted—when the power will not be exercised.*

See KINGSLAND v. MAYOR, ETC..... 599

—§ 1847, sub. 4—*Power of the court to order a reference to take testimony as to facts, and to refuse to enter an interlocutory judgment—such an order is appealable.*

See CENTRAL TRUST CO. v. N. Y. CITY AND NORTHERN RY. CO.... 603

## CODE OF CIVIL PROCEDURE — Continued.

PAGE.

- § 1582 — *Action for partition — a tenant by the curtesy of an undivided share, may maintain it*  
*See TILTON v. VAIL*..... 688
- § 1619 — *Admeasurement of dower — question as to whether a specific parcel of land can be set aside — at what time and in what manner it must be determined — the rights of all the parties must be considered.*  
*See O'DOUGHERTY v. REMINGTON PAPER CO.*..... 192
- § 1698 — *Undertaking to secure a return of chattels — form of — Code of Civil Procedure, §§ 1698, 1704.*  
*See WEBER v. MANNE*..... 557
- § 1704 — *Undertaking to secure a return of chattels — form of.*  
*See WEBER v. MANNE*..... 557
- § 1886 — *Refusal of an executor or administrator to refer a claim — when the claimant is entitled to recover costs — effect of the certificate of the judge or referees as to the refusal to refer.*  
*See ELY v. TAYLOR*..... 205
- § 2141 — *Power of the court to correct erroneous assessments on the hearing of a certiorari to review them.*  
*See PEOPLE EX REL. NEWSTADT v. COLEMAN*..... 581
- § 2281 — *Contempt of court — actual loss or injury must be proved, to support a fine to indemnify the party injured, imposed under this section of the Code of Civil Procedure — when a fine imposed under this section cannot be changed on appeal to a fine for punishment — proper order to be entered in such cases.*  
*See FALL BROOK COAL CO. v. HECKSHER*..... 534
- § 2468 — *Receiver in Supplementary proceedings — the title to only such real estate of the debtor as lies within this State is vested in him.*  
*See SMITH v. TOZER*..... 22
- § 2481, sub. 6 — *Surrogates — order opening decrees — how reviewed.*  
*See PEOPLE EX REL. STEVENS v. LOTT*..... 408
- § 2682 — *Letters of administration — when they may be granted without issuing a citation to non-residents.*  
*See LIBBEY v. MABON*..... 470
- § 3068 — *Appeal to the County Court from a justice's judgment — the right to a new trial is determined by the amount demanded in the amended complaint, and not by that asked for in the original pleadings — when an amount exceeding fifty dollars, claimed in the answer setting up a tort, will not justify a new trial on appeal.*  
*See HINKLEY v. TROY AND ALBIA R. R. CO.*..... 281
- § 3069 — *Motion to dismiss an appeal to the County Court because of a failure of the sureties upon an undertaking to justify — the right to so move is not lost by the service of a notice of retainer or of trial.*  
*See SLATTERY v. HASKIN*..... 56
- § 3070 — *Costs — the right thereto is governed by the law in force at the time the right to them accrues.*  
*See BALCOM v. TERWILLIGER*..... 170
- § 3070 — *Offer of judgment on appeal from a judgment in a justice's court — right of the party accepting it to costs.*  
*See HOLLENBACK v. KNAPP*..... 207
- § 3284 — *Costs — there must be a recovery to entitle a defendant, succeeding on some of the issues, to recover costs.*  
*See CROSBY v. COBB*..... 166
- § 3245 — *When the treasurer of a village is its chief fiscal officer within the meaning of this section.*  
*See FISHER v. VILLAGE OF CORTLAND*..... 178
- § 3347, sub. 11 — *Costs — the right thereto is governed by the law in force at the time the right to them accrues — Code of Civil Procedure, § 3070.*  
*See BALCOM v. TERWILLIGER*..... 170
- [See table of sections of the Code of Civil Procedure cited ante in this volume.]

**CODE OF CRIMINAL PROCEDURE** — § 395 — *Confession of a prisoner — not admitted when induced by a promise that the accused shall obtain the benefit of a State's witness — when the question whether such promise was made should be submitted to the jury.*

See *PEOPLE v. KURTZ*..... 335

[See table of sections of the Code of Criminal Procedure cited *ante* in this volume.]

**COLLATERALS:**

See *DEBTOR AND CREDITOR*.

**COLLECTOR** — *Giving of bond.*

See *BONDS*.

**COLLEGES** — *Taxation — exemption of buildings, and the lots on which they stand, of colleges — 1 R. S., 388, § 4, sub. 3, as amended by chap. 397 of 1883.*

See *PEOPLE EX REL., ETC., v. BARBER*..... 27

**COLLISIONS AT SEA:**

See *SHIPPING*.

**COMMISSIONERS** — *Of Excise.*

See *EXCISE*.

— *Of Highways.*

See *HIGHWAYS*.

**COMMON CARRIERS:**

See *CORPORATIONS*.  
*RAILROADS*.

**COMPLAINT:**

See *PLEADINGS*.

**CONFESSIONS** — *As Evidence.*

See *EVIDENCE*.

**CONFIDENTIAL COMMUNICATIONS** — *Between counsel and client.*

See *EVIDENCE*.

**CONFLICT OF LAWS** — *Liability of a married woman on a note — when determined by the laws of the State where the contract is made, and not by those of the State in which payment is to be made.*

See *VOIGT v. BROWN*..... 394

**CONSIDERATION:**

See *CONTRACTS*.

**CONSPIRACY** — *Actions in tort — a several judgment may be rendered against one of several defendants.]* 1. The plaintiff, a corporation, organized under the laws of this State for the purpose of manufacturing, refining and selling oil, brought this action against seven defendants, three of whom were corporations, one of them being the Standard Oil Company, a corporation organized under the laws of this State and engaged in carrying on the same business as the plaintiff. The plaintiff's cause of action was based upon the charge that the defendants had combined and confederated together for the purpose, and in the manner set forth in the complaint, of ruining the plaintiff's business and driving it out of the market. Upon an appeal from a judgment overruling a demurrer interposed by the defendant, the Standard Oil Company, upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

*Held*, that it was not necessary to examine the complaint for the purpose of ascertaining whether a good cause of action was stated as against the defendants, other than the Standard Oil Company, for the reason that, in actions of tort, judgment may be entered against either of the defendants, when more than one is joined, if the proofs establish a cause of action against such defendant.

**CONSPIRACY — Continued.**

That it would not be necessary to prove upon the trial the conspiracy alleged in the complaint, except for the purpose of securing a joint recovery against all the defendants. *LUBRICATING OIL CO. v. STANDARD OIL CO.*... 153

2. — *Liability of a corporation for slandering the business of another corporation carrying on the same business — what facts show this to have been done.* [It was alleged in the complaint that the defendants, other than the Standard Oil Company, formed a conspiracy to injure the plaintiff, and did certain acts injurious to the plaintiff, in pursuance of such conspiracy, prior to the time at which the defendant, the Standard Oil Company, was organized; that after that defendant was organized it joined and became a party to the conspiracy and ratified said previous actions; that after the organization of that defendant, the conspirators, by letters and other means, requested various customers of the plaintiff not to purchase oil from it, and represented that the plaintiff's oil was of inferior quality, and that the plaintiff had no right to make such oils and vend the same on the market, and threatened the defendant's customers with law suits and expenses if they continued to patronize the plaintiff and purchase its commodities, and employed one Stearns to make such statements, and that he did make the same at the city of Boston and in other places in the State of Massachusetts, and in various parts of New England, to certain customers of the plaintiff, and, by reason thereof, the plaintiff lost many of its said customers and much of its trade and business, and suffered great loss and damage in consequence thereof; that the said conspirators, by their agents and servants, did falsely represent to the customers of the plaintiff that said conspirators, or some of them, had patents that covered the entire product of plaintiff's manufacture, and that the plaintiff had no right to make the oil it was then manufacturing, and that all who bought oil of the plaintiff were infringing the patents of some one or all of the said conspirators, and that one or more of said conspirators would bring actions for such infringements against each and every of the customers of the plaintiff who bought oils or dealt with the plaintiff, by reason of which they prevented many of the plaintiff's customers from purchasing oil from it.]

*Held*, that it was manifest that by the use of the term conspirators the plaintiff intended to charge all of the defendants, including the Standard Oil Company, with the illegal acts alleged to have been done.

That if the acts thus charged were proved to have been done by the defendant, the Standard Oil Company, through its officers or agents, it had slandered the plaintiff's business and committed an inexcusable wrong condemned by the laws of the land as well as by honorable traders and merchants. *Id.*

3. — *A pleading should allege that the acts complained of were done by the corporation and not by its agent.* [That in stating his cause of action against the corporation it was proper for the plaintiff to charge that the acts complained of were the acts of the corporation itself, and that it was not necessary, nor would it be proper, to aver that they were done by and through the authorized agent of the corporation. *Id.*

**CONSTABLES — Defects in a constable's bond —** 1 R. S., § 21, as amended by chap. 788 of 1872. 1. This action was brought by the plaintiff, as constable of the town of Fulton, Schoharie county, to recover the value of certain personal property which he had levied upon and advertised for sale at public auction, by virtue of two executions, issued by a justice of the peace upon two judgments against one George G. King; this property the defendant, claiming the same under a chattel mortgage given to him by King, but not filed until after the levy, took and carried away after the levy and before the sale.

Upon the trial it appeared that the bond filed by the constable upon his election, in February, 1855, complied with the requirements of section 21 of 1 Revised Statutes, § 46, but did not contain the provision prescribed by chapter 788 of 1872, making the person signing the same liable to pay for any damages which might be occasioned by any act or thing done by the constable by virtue of his office.

On January 12, 1886, the day before the trial, the plaintiff executed and filed with the town clerk a new bond, with the same sureties as in the first, which complied with the statute as amended in 1872.

**CONSTABLES — Continued.**

PAGE.

*Held*, that the trial court erred in granting a motion for a nonsuit, made upon the ground that at the time of making the levy the plaintiff was not a constable *de jure*, and, therefore, had no right to bring this action as constable. *ADAMS v. TATOR*..... 384

2. — *Until removed the constable's acts are to be treated as those of an officer de jure as to third persons.*] That, as the plaintiff had been duly elected, had taken the oath of office and filed the bond required by the statute prior to the amendment of 1872, he was not merely a *de facto* officer, but an officer *de jure*, with a title defeasible only by the action of the people in the nature of a *quo warranto*, or by the action of a justice of the peace declaring a vacancy to exist, and appointing another person to fill it. *Id.*

3. — *Execution creditors protected.*] That, even if the plaintiff was merely a *de facto* officer, it might be doubted whether the rule preventing such an officer from asserting his title to his own advantage, at the expense or to the injury of another, but holding his acts to be valid, so far as to protect third parties from injury, should be so applied as to deprive the judgment creditor of the lien which attached to the judgment debtor's property upon the delivery of the execution to the *de facto* constable. *Id.*

**CONSTITUTIONAL LAW —** *The legislature cannot provide for the election of a justice of the peace for a village — Constitution, art. 6, sec. 18.*] 1. The charter of the village of Canton provides for the election of "one justice of the peace," by ballot, at the annual meeting held in said village for the election of officers, and confers upon him "the usual powers of justices of the peace of towns in relation to crimes and misdemeanors, and to oaths and acknowledgments, and also in civil actions in which all the parties shall be residents or inhabitants of said village."

*Held*, that the statute was unconstitutional, as it violated the provisions of section 18 of article 6 of the Constitution.

*PEOPLE EX REL. SINKLER v. TERRY*..... 273

2. — *There can be no de facto officer unless there be an actual existing office.*] That the acts of a person claiming to hold the office of justice of the peace of said village, by virtue of an election at the annual meeting held for the election of village officers, would not be regarded as valid, as the acts of a *de facto* justice, for the reason that there was no such office as justice of the peace for the village of Canton, and that, in order that there may be an officer *de facto*, there must actually exist the office into which he can intrude. *Id.*

3. — *Offices of police justice and justices of the peace distinguished.*] It seems, that if the designation of the officer had been police justice instead of justice the act might have been sustained, under the provisions of section 19 of article 6 of the Constitution, providing that "inferior local courts of civil and criminal jurisdiction may be established by the legislature," upon the implied construction that his civil and criminal jurisdiction was limited to the village, and thus local and within the express power conferred by this section of the Constitution. *Id.*

— *Amendment to the United States Constitution requiring the accused to be confronted with the witnesses against him — not applicable to trials in State courts for State offenses — construction of this provision in the bill of rights of the State of New York — right of the accused to testify as to a conversation with a witness who has testified as to a confession made by him — right of the accused to cross-examine a witness in order to show bias against him.*

*See PEOPLE v. PENHOLLOW*..... 108

— *When an underground railroad is a street railroad within section 18 of article 3 of the Constitution — chapter 582 of 1880 is unconstitutional as violating this section.*

*See MATTER OF NEW YORK DISTRICT RAILWAY CO.*..... 631

**CONSTRUCTION — Of a contract.**

*See CONTRACT.*

— *Of a will.*

*See WILL.*

— *Of deeds.*

*See DEEDS.*

**CONSTRUCTION — Continued.**— *Of statutes.**See* SESSION LAWS.

REVISED STATUTES.

PAGE

**CONTEMPT** — *Contempt of court—actual loss or injury must be proved, to support a fine to indemnify the party injured, imposed under section 3281 of the Code of Civil Procedure*] 1. Upon the failure of the defendant to appear and answer, as he was required to do by an order made in supplementary proceedings, he was adjudged to be in contempt, and fined the sum of \$834.68, the amount of the judgment, and ten dollars costs.

*Held*, that as it was not proved that the plaintiff had sustained actual loss or injury, or had been deprived by the misconduct of the defendant of the amount of his judgment, there was no foundation for imposing this fine.

FALL BROOK COAL CO. v. HECKSHER..... 534

— 2. *When a fine imposed under section 3281 cannot be changed on appeal to a fine for punishment.*] That although the court had power to impose, in addition to the fine for indemnity, a further fine by way of punishment, not exceeding the sum of \$250 and costs and expenses, yet, as it had not exercised this power in this case the appellate court could not reduce the fine to the amount, or any portion of the amount which might have been prescribed by way of punishment. *Id.*

3. — *Proper order to be entered in such cases.*] That the court should have fined the defendant, by way of punishment, in a sum not exceeding \$250, in addition to the plaintiff's costs and expenses, and have directed his imprisonment until he should appear and submit to an examination concerning his property, and pay the fine with the costs imposed upon him. *Id.*

**CONTRACT** — *Contract for the construction of a railroad — lien on railroad for laborers' wages.*] 1. This action was brought by the plaintiff, a sub-contractor, to recover for work done and materials furnished prior to July 25, 1882, under an agreement with the defendants, who were contractors for the construction of the Ontario Belt Railway, by which the plaintiff agreed to construct certain portions of the road-bed of the railroad company, at prices specified in the contract, and which were payable in cash, bonds and stock of the company in the proportion and at the times therein provided. The referee, before whom the action was tried, found that for the work done and materials furnished by the plaintiff under the agreement, prior to July 25, 1882, he was entitled to recover the sum of \$12,834, for which sum and interest thereon he directed a judgment.

The referee also found that the plaintiff sub-let the work of construction to Moore & Sullivan, who entered upon the performance of the work; that in the latter part of July the laborers on the work became clamorous for their pay and insubordinate, refusing to work longer unless paid, and that they did quit on or before July twenty-ninth; that Moore & Sullivan, with the plaintiff's assent, on that day requested the defendants to pay the men or to furnish the money for that purpose, and proposed to give them security that the money should be paid to the laborers in case they furnished it; that after the defendants had refused to do this, the plaintiff made a demand on the defendants that payment be made to him.

That on that day, and during several following days, the defendants procured a large number of the laborers to make and file their claims for unpaid services against the railroad company, amounting in all to about \$6,940.10, under chapter 669 of 1871, and after the notices of such claims were handed to the person on whom the service was intended to be made, the claims were assigned to the defendants by the laborers, and the defendants paid to them respectively the amounts of their claims; that none of these claims have been enforced, and no attempt has been made to collect them by action against the company, but that the defendants still hold them as assignees; that these claims are or purport to be against Moore & Sullivan, and not the plaintiff.

*Held*, that as it was admitted that the defendants entered into a contract with the company for the construction of the road, the property of the company could be charged on default of the contractors, or sub-contractors, to pay the laborers. MOORE v. TAYLOR ..... 45



**CONTRACT — Continued.**

PAGE.

2. — *Right of the person, contracting with the company, to pay claims for services filed by laborers against a second sub-contractor, and apply the same in payment of the amount due to a first sub-contractor to whom such person has sublet the contract.*] That, as the company would be entitled to compel the defendants to reimburse it for any amount which it might be compelled to pay on account of such claims, the defendants had such an interest in seeing that such claims were paid by their immediate, or any subsequent sub-contractors, as required the payment so made by them to be treated as made for the plaintiff, and authorized the defendants to apply the amount thereof upon their indebtedness to him. *Id.*

3. — *When he does not lose this right by taking an assignment of the claims filed.*] That, in view of all the circumstances of the case, the taking of the assignments of the claims by the defendants could not be treated as an obstacle to the application of the amount of them in reduction of the recovery for the work done, on account of which the money was advanced. *Id.*

4. — *Right to recover, as damages for a breach of a contract, profits which would have been received if the contract had been completed.*] In a second action tried before the same referee, brought to recover for work done after July twenty-fifth, and damages for a breach of the contract on the part of the defendants, the referee found that after August 1, 1882, the plaintiff demanded of the defendant the payment of the money and bonds due him on the contract, and that they refused to pay the same, or any part thereof, except the sum of \$8,000, which they offered to pay to the plaintiff on his agreeing that it should be paid, under their direction, to the laborers; that the apportioned payments provided for in the contract were intended by the parties to put the plaintiff in funds to pay his laborers and the expenses of doing said work, and, therefore, became a very essential part of the contract; that on or about August twelfth the plaintiff abandoned the construction of the railroad, for the reason that the defendants refused to perform their part of said contract, in refusing to pay the said cash and bonds due on August first for work done up to July twenty-fifth, thus depriving him of the means to pay off his laborers and induce them to continue the work; that the plaintiff was entitled to recover whatever damages he had sustained by reason of the defendants' breach of the contract in the particulars stated.

The referee allowed as damages the remainder obtained, by deducting from the sum of the amount to be paid in cash the par value of the bonds and stock to be delivered, and ten per cent of these amounts added thereto, the amount of the payments made and the estimated cost of completing the work.

*Held*, that a claim made by the defendants that a right reserved by the contract—to the effect that in the event they should for any reason fail to continue the work and should notify the plaintiff to suspend or cease operations, a measurement should be made of and payment be made for the work done at specified rates—operated to defeat the right of the plaintiff to recover damages, or to claim anything otherwise than what was provided for as compensation by the contract, could not be sustained, as the facts proved did not bring the case within this provision of the contract.

That it was error to allow the plaintiff to recover, as damages: the prospective profits which the completion of the performance of his contract would have given him.

The right to such relief does not arise out of every breach of a contract for the performance of services, but is dependent upon that which operates as a denial of the right to proceed and complete the work contracted for. *Id.*

5. — *Such damages are not recoverable where the breach complained of is simply a failure to pay an installment of money due by the terms of the contract.*] Mere default in payment of an installment, when it becomes due, is not a denial of the right of the contractor to continue in the performance of the services; and although it will permit him to abandon the work and recover for what has already been done under it, it will not enable him to recover the damages which the law would give in case of a refusal to let him proceed in the performance of the contract. *Id.*

## CONTRACT — Continued

PAGE.

6. — *For a sale of iron—right of the purchaser to reject such as is not of the quality specified.*] This action was brought by the plaintiffs to recover back moneys paid by them for freight, duties and other charges on iron which the defendants, merchants in the city of Liverpool, had by a written agreement, signed by their brokers in the city of New York, agreed to sell and deliver to the plaintiffs. The agreement, which was dated in New York, stated that the defendants had sold to the plaintiffs 100 tons W. I. W., or equal hoop iron, at £10 per ton; 100 tons W. I. W., or equal sheet iron, at £11.15.0; fifty tons R. G., or equal sheet iron, at £16.5.0, "all free on board Liverpool, payment by 60d St. Bl. Exchange, against shipping documents here, less two and one-half per cent." It was understood that the defendants, who were not manufacturers of iron, should obtain it from other persons and ship it to the plaintiffs. The plaintiffs accepted all the iron agreed to be sold except the hoop iron and the final shipment of the R. G. sheet iron, which they refused to accept, upon the ground that the iron was very much inferior in quality to that which they were, by the terms of the agreement, entitled to receive. After the hoop iron upon one vessel had been unloaded and weighed by the officers of the custom house, and removed to the plaintiffs' place of business, it was rejected by them, of which notice was given to the defendants.

*Held*, that the plaintiffs were justified in rejecting it at that time, and were entitled to recover from the defendants what they had paid for freight, duties and other charges or advances upon the iron. *PIERSON v. CROOKS.* 571

7. — *When the examination is not required to be made at the place of shipment.*] That a claim made by the defendants that the right to examine and reject, or accept must be exercised before the iron was received and shipped at the city of Liverpool, and could not be exercised after its arrival in the city of New York, was not well founded. *Id.*

8. — *Rejection without examination*] After the arrival in the city of New York of one of the vessels upon which the hoop iron was loaded, and before the other vessel had left the city of Liverpool, and before it had been loaded with all the iron to be shipped upon it, the plaintiffs notified the defendants that they would not receive any more iron of the quality shipped on the first vessel.

*Held*, that as it was shown that the iron loaded on the second vessel was of the same quality as that loaded on the first, the plaintiffs were entitled to reject it without inspecting or examining it. *Id.*

9. — *When the purchaser may accept part and reject the remainder of the iron delivered.*] Some of the hoop iron was shipped upon vessels upon which were also shipped portions of the sheet iron. The sheet iron was accepted and received by the plaintiffs, while the hoop iron was rejected.

*Held*, that the contract being for the sale of different qualities of iron at different prices it was not to be considered as an entire contract, but as a severable one, and that the plaintiffs were entitled to receive that distinct part of the property which complied with the terms of the agreement, and to reject that portion thereof which failed to comply therewith. *Id.*

10. — *Payment not a waiver.*] That payments made by the plaintiffs towards the purchase-price of the iron did not operate as a waiver of their right to object to the quality of the iron, as such payments were made, as required by the agreement, upon the production of the shipping documents, and upon the supposition that the contract had been, or would be, so performed as to entitle the defendants to the money. *Id.*

11. — *When the purchaser may reject iron not loaded on the vessel at the port specified in the contract.*] A portion of the R. G. sheet iron was not laden on the vessel by which it was shipped at Liverpool, but was laden at Cardiff, a port in Wales on the British channel.

*Held*, that the plaintiffs were entitled to refuse to accept it as the defendants had, by the agreement, agreed to ship the iron at Liverpool. *Id.*

12. — *Payment without information as to the facts not a waiver.*] That the performance of this condition of the agreement was not waived by the plaintiffs, by receiving and paying for other iron so shipped, as the payment was made without information on the part of the plaintiffs that such other iron had not been shipped at Liverpool. *Id.*

CONTRACT — Continued.

PAGE.

13. — *When a condition of a bond will be treated as an agreement — when specific performance thereof will be enforced.*] On February 5, 1880, the defendant made to the plaintiff his bond in the penal sum of \$10,000, containing the condition "that if the said Julia Martin (the plaintiff), her heirs, executors, administrators or assigns shall pay to the said Jesse Colby (the defendant), his executors, administrators or assigns the just and full sum of fifty-eight hundred and fifty dollars, and the interest from the date hereof in one year from the date hereof, then said Jesse Colby, his heirs, executors or administrators shall execute and deliver to the said Julia Martin, her heirs, executors and administrators a good and sufficient warranty deed in fee simple, with the usual covenants, of the same lands in the town of Alden which are described in a certain deed this day executed by Levinus W. Cornell and wife to Jesse Colby, then this obligation to be void, else to remain in full force and virtue; and the said Julia Martin shall pay, in addition to the stated sum, for all improvements that the said Jesse Colby shall have done on the said lands during one year from the date hereof, and the said Jesse Colby shall have all the privileges of the said lands as he would have if this writing was not made."

On February 5, 1881, the plaintiff caused a tender to be made to the defendant of the amount she claimed was then due to him, and requested him to execute a deed of the lands. He having refused so to do, upon the ground that the bond had been canceled, the plaintiff brought this action to compel a specific performance of the agreement, and recovered a judgment therefor.

*Held*, that the agreement to execute and deliver the deed of the lands constituted an agreement to sell them, and imposed upon the defendant a duty to convey the lands, which could be specifically enforced in this action.

MARTIN v. COLBY. . . . . 1

14. — *Presumption as to an instrument having been under seal.*] The original bond was not produced upon the trial, and the copy used had no mark following the name subscribed to indicate that the original was sealed, but the language of the instrument declared that it was sealed.

*Held*, that this was some evidence of the fact that the original bond was sealed. *Id.*

15. — *What consideration will support an agreement.*] That a sufficient consideration for the defendant's agreement was shown by proving that the conveyance, made at the same time to the defendant by Cornell, was made pursuant to an undertaking that the defendant should permit the plaintiff to purchase the property at the price mentioned in the bond. *Id.*

16. — *Rescission of agreement.*] On March 31, 1880, thirty-five acres of the land were conveyed by the defendant and his wife to the plaintiff, by a deed expressing the consideration of \$3,000, the plaintiff giving back a mortgage to secure \$2,200 of the purchase-money.

*Held*, that this did not necessarily operate as a satisfaction or rescission of the contract expressed in the bond. *Id.*

17. — *Tender.*] That as the nature of the liability which the plaintiff might incur for the improvements, which might be made by the defendant, was such that she could not accurately measure their value, and as no means was provided by the contract for determining this question the provision for the payment for such improvements would be construed to create a liability rather than a condition precedent, and that the plaintiff was not required to cover by the tender the value of any improvements which the defendant might have made. *Id.*

18. — *The court will not direct specific performance where a party is unable to perform his contract.*] The defendant offered, but was not allowed, to prove that his wife had refused, and did refuse, to sign a deed conveying the lands to the plaintiff; the refusal of his wife to execute the deed having been alleged in his answer.

*Held*, that the court erred in refusing to receive the evidence. *Id.*

19. — *Bond — right of one, not to a party to it, to enforce an agreement by the obligor to pay a debt, due to the claimant from the obligee's ancestor.*] In consideration of the conveyance to him of certain real and personal property,

**CONTRACT—Continued.**

PAGE.

Robert Clements assumed and agreed to pay certain indebtednesses of his grantors', W. and B. Van Vranken, and to save them harmless therefrom. After Robert's death, his administrator, John Clements, entered into an agreement with one Skinner, the defendant herein, as executor (no testator being named), by which it was agreed that John Clements should convey, or cause to be conveyed, the said property, to Skinner, and that Skinner should pay such indebtedness. Subsequently the widow and all the heirs of Robert Clements (except a minor) conveyed the real estate to the defendant Skinner, as executor of Peter Skinner, deceased, in consideration of \$11,000 and a bond to be executed by him, and covenanted that the minor would convey, which he subsequently did. In consideration of this conveyance, Skinner executed to John Clements, administrator of Robert, and attorney in fact for the widow and heirs, a bond, reciting the existence of the claims against the estate of Robert and specifying them; the conveyance was on the express agreement that Skinner would pay the debts and save said estate harmless. The condition was that the obligor should pay, or cause to be paid, the aforesaid claims and save the said estate harmless, and within four months deliver receipts for such payments to the obligee, and by the bond he further agreed "to and with the owners of said claims to pay all that is justly due them, not exceeding the aforesaid amounts."

*Held*, that an owner of any of the said claims could maintain an action against the defendant, upon the bond, to recover the amount due to him from the Van Vrankens. **PULVER v. SKINNER**..... 823

20. — *Construction of an agreement—when the words "legal representatives" means executors and administrators, and not next of kin.* John Greenwood died in May, 1865, having by his will devised substantially all his estate to his widow during her life, with remainder to his four children on her death; opposition was made to the probate of the will, which was abandoned upon the widow's entering into an agreement by which she was to pay, during her life, one-eighth of the net income to each of the four children, and in case of the death of either of said children during her life, she was to pay the one-eighth part of said income, so "agreed to be paid to the child so dying, to his or her legal representatives," so long as the said covenants and agreements should be observed and performed.

One of the daughters died childless in 1880, leaving a will by which she gave all her estate to her husband, stating therein that she intended to include all interests acquired and to be acquired by her from the estate of her father. The husband died in 1884, leaving a will, of which the defendants, Holbrook and Foote, were appointed executors.

*Held*, that the words "legal representatives" meant executors and administrators, and not next of kin, and that the one eighth of the income, to which the daughter so dying was entitled, should be paid to the executors of the husband, and not to the brothers and sisters, or their issue, of the daughter so dying. **GREENWOOD v. HOLBROOK**..... 633

21. — *When invalid because not supported by any legal consideration.* By an agreement entered into between the parties to this action the defendant agreed to pay to the plaintiff two dollars and fifty cents on each and every 5,000 bushels of grain purchased and sold, or sold and purchased, in the course of the defendant's business, to any customer or customers who should be introduced to him by the plaintiff, or by either of the persons so introduced.

*Held*, that so far as the contract provided for the payment of the amount specified for the act of the plaintiff in introducing customers to the defendant, it was valid, as this was an act of service performed by the plaintiff, beneficial to the defendant, which the law will permit to operate as a legal consideration.

That, in so far as it provided for the payment of the amount specified, in the case of persons introduced to the defendant by the dealers introduced to him by the plaintiff, it imposed no legal obligation upon the defendant, as there was no legal consideration for his promise to pay, since any benefit he derived therefrom was in no way dependent upon the act, authority, direction or concurrence by the plaintiff, nor did the latter subject himself to any inconvenience or injury. **HAMLIN v. WHEELLOCK**..... 580

**CONTRACT — Continued.**

PAGE.

22. — *Liability of a married woman on a note — when determined by the laws of the State where the contract is made, and not by those of the State in which payment is to be made.*] The husband of the defendant, both of whom were domiciled in this State, went into Connecticut and there, as authorized by her, signed her name to an accommodation note, dated and payable in Connecticut, to the order of a firm of which he was a partner. He took the note to New York, procured it to be discounted by the plaintiffs, and received the proceeds thereof.

*Held*, that as the note had no inception until it was delivered to the plaintiffs, the contract was made in the State of New York, and was governed by its laws and not by those of Connecticut, and that the defendant was liable upon the note, although she would not have been so had the contract been made in Connecticut. *VOIGT v. BROWN*..... 394

23. — *Extension of time of payment of a debt — not necessarily effected by the acceptance, as collateral security, of accounts not then due.*] The defendant, being indebted to the plaintiffs for goods, wares and merchandises sold to him, assigned, as collateral security, certain accounts against other persons, not yet due, by a written instrument which, after reciting his indebtedness to the plaintiffs, stated that "for the purpose of securing said debt to said firm I do hereby sell, assign and set over to them the following accounts and demands, to wit:"

*Held*, that the plaintiffs did not, by accepting the assignment of the said accounts, extend the time of payment of the debt then due to them, to the time when the said accounts would become due. *WHEELER v. JONES*.... 374

— *Diversion of a promissory note from the use to which it was to have been applied — when that fact may be set up by the maker as a defense to an action brought by a transferee of the note, receiving the same as collateral to a pre-existing indebtedness.*

*See* *AYRES v. DOYING* ..... 630

— *Leases of wharves in New York by the commissioners of the sinking fund — void if not let at public auction — right of a railroad company to acquire a lease of a ferry franchise not having either end at the railroad terminus — in what cases an action to restrain illegal acts will lie by a taxpayer under chapter 531 of 1881.*

*See* *STARIN v. MAYOR, ETC.*..... 549

— *Contract signed by the board of trustees of a village — power of the board to liquidate the damages — what provision will be construed as liquidating the damages and not as fixing a penalty.*

*See* *PARR v. VILLAGE OF GREENBUSH* ..... 232

— *Contract between railroad companies, to endeavor to promote each other's interests — when not void as against public policy — a plea of ultra vires will not lie in favor of a party who has received benefits under the contract.*

*See* *TONAWANDA R. R. Co. v. N. Y., L. E. & W. R. R. Co.* ..... 496

— *Bond of a deputy sheriff for the faithful discharge of his duties — the sureties thereon are bound only for acts done after its delivery — the presumption of its delivery upon the day of its date is destroyed by proof of the time of its actual delivery.*

*See* *REILLY v. DODGE* ..... 646

— *Filing of a chattel mortgage — 1883, chap. 279 — a subsequent agreement affecting it need not be filed — its validity is not affected by the fact that part of the agreement rests in parol.*

*See* *PRESTON v. SOUTHWICH* ..... 291

— *For the sale of real estate — an objection to the title based on a decision of the General Term of the Supreme Court, will relieve the purchaser from accepting the title.*

*See* *FREIS v. PLUMMER* ..... 440

— *Infant — when allowed to avoid a transfer of stock belonging to her and bearing her signature.*

*See* *SMITH v. BAKER* ..... 504

**CONTRACT — Continued.**

PAGE.

— *Letting of — right of a board of supervisors, compelled to advertise for proposals and to award the contract to the lowest bidder, to reserve a right to reject bids — 1884, chap. 230, § 8.*

See *PEOPLE EX REL. CARLIN v. SUPERVISORS*..... 456

— *Mutual benefit life assurance companies—1883, chap. 175 — duty of such companies to resist the payment of illegal claims.*

See *MAYR v. EQUITABLE LIFE ASSOCIATION*..... 237

— *Evidences — when a reduction in the rent reserved by a lease under seal can be proved by unsealed instruments thereon.*

See *HART v. HAZARD*..... 209

— *Executory contract for the sale of land — when it is terminated by a conveyance of the fee of the land, to a stranger, by the vendor.*

See *SMITH v. ROGERS*..... 110

— *Lien on personal property — what agreement to give security will be enforced by courts of equity — who should be made defendants in an action to foreclose it.*

See *WILLETTS v. BROWN*..... 140

— *Evidence — parol evidence is inadmissible to explain a patent ambiguity — when a condition will be held invalid for uncertainty because of unfilled blanks therein*

See *VANDEVOORT v. DEWEY*..... 68

— *Change in the disposition of money to be received on the death of a member of a lodge — the transfer must be made in the form prescribed by the by-laws of the lodge.*

See *IRELAND v. IRELAND*..... 212

— *Lease of lands to be used for the purpose of boring for oil or gas — construction of covenants contained in it — when a covenant will be held void for uncertainty.*

See *EATON v. WILCOX*..... 61

— *Certificate of deposit — when a promise to pay will be implied therefrom — what facts establish a transfer thereof.*

See *FIRST NATIONAL BANK v. CLARK*..... 16

— *Of insurance.*

See *INSURANCE*.

— *Of lease.*

See *LANDLORD AND TENANT*.

See *ASSIGNMENT*.

**CONTRIBUTION — Accommodation indorser — when he cannot compel the guarantor of a note to contribute.**

See *PHILLIPS v. PLATO*..... 189

**CONTRIBUTORY NEGLIGENCE:**

See *NEGIGENCE*.

**CONVERSION — Pleadings — what allegations establish a cause of action for conversion.**

See *THAYER v. GILE*..... 268

— *Of real into personal property — of personal property.*

See *PERSONAL PROPERTY*.

**CONVEYANCE :**

See *DEEDS*.

*VENDOR AND PURCHASER*.

**CORPORATIONS — Receiver of a corporation — power of the court to direct him to issue certificates to pay wages due to employees — when they cannot be made to affect a prior lien by mortgage ] 1. Upon an application for the distribution of the surplus moneys arising upon the foreclosure of a mortgage,**

**CORPORATIONS — Continued.**

PAGE.

subject to which the Rockaway Beach Improvement Company had purchased the mortgaged premises, it appeared that, after the purchase, and in April, 1880, the company executed a mortgage on the same property to one Soutter, trustee, to secure the payment of 700 bonds of \$1,000 each; that in August, 1880, the company having become embarrassed, one Attrill, a large stockholder, brought an action against it, to which neither the trustee of the said mortgage, nor the holders of bonds thereunder, were made parties, praying for the appointment of a receiver and the dissolution of the company. In this action an order was made appointing a receiver, and thereafter *ex parte* orders were made authorizing the receiver to borrow \$100,000 to pay wages due the workmen and to issue certificates therefor, which certificates were to be a first lien upon all the property of the company, and have priority over the mortgage to Soutter, as trustee.

*Held*, that there was no principle upon which the claims of employees for labor performed, before the receiver was appointed, could be so extended as to impair or postpone the lien of the mortgage. **RAHT v. ATTRILL..... 414**

2. — *Threatened injury to property.*] That affidavits showing that the property was in danger of being destroyed from the passion of unpaid workmen unless such certificates were issued, did not authorize the court to make the order. *Id.*

3. — *Mortgage trustee, consent not presumed.*] That the fact that Soutter was a stockholder and director of the company, as well as the trustee of the bondholders, and that as one of the directors he approved of the orders authorizing the certificates to be issued, did not prove that he, as trustee, consented to violate his duty to the bondholders, even if he could represent them for such a purpose. *Id.*

4. — *Change in the disposition of money to be received on the death of a member of a lodge — the transfer must be made in the form prescribed by the by-laws of the lodge.*] Upon the application of Delbert Ireland, a certificate of membership in the Grand Lodge of the Ancient Order of United Workingmen was issued to him, which entitled him to participate in the beneficiary fund of the order to the amount of \$3,000, which sum was, at his death, to "be paid to Jennie Ireland, sister, \* \* \* upon the express condition that Ireland should, in every particular while a member of the order, comply with all the rules and requirements thereof." One of the rules of the order, which was printed upon the back of the certificate, provided that any member desiring to make a new direction as to its payment might do so by authorizing such change in the form prescribed and printed upon the back of the certificate, to be attested by the recorder of the lodge and reported to the grand recorder, paying fifty cents and surrendering the old certificate and taking a new one.

Ireland was unmarried when he procured the certificate, but subsequently married the defendant. On Sunday, the 21st of June, 1885, being under apprehension of death from existing illness, he sent for a friend, Mr. Wing, delivered to him the certificate and told him that he wanted it so changed that his wife should have the benefit of it; that he wanted Wing to have it changed. Wing proposed to go immediately with the certificate to the recorder of the lodge, who resided in the village, and have the change made then, but Ireland objected to having it done on Sunday and told Wing to have it done the next day. Ireland's wife was present at the time. Wing took the certificate and on the following morning sought to find the recorder of the lodge, but did not succeed in doing so. Ireland died that morning before any further steps had been taken to change the beneficiary.

*Held*, that the sister was the owner of the certificate and was entitled to receive the amount payable thereunder. **IRELAND v. IRELAND..... 212**

5. — *Falsely certificate as to the stock of a company being paid in full — 1875, chap. 611, sec. 21 — over-valuation of property purchased by a company and paid for in stock.*] In the month of July, 1879, the defendant, Attrill, purchased from one Littlejohn a tract of land containing about 140 acres, for \$80,000; he paid \$3,000 in cash and the balance was secured by a purchase-money mortgage upon the premises. In February, 1880, the Rockaway Beach Improvement Company was incorporated under the act of 1875, the capital stock being fixed at \$700,000, the defendants Attrill and Soutter being two of the commissioners named to receive subscriptions therefor. On April thir-

**CORPORATIONS — Continued.**

PAGE.

teenth the company resolved to purchase the property for the sum of \$700,000, in payment of which all the capital stock of the company was issued to the defendant Attrill, no part thereof being paid in cash. Attrill conveyed the property to the company, subject to the purchase-money mortgage, by a deed dated April first, acknowledged April tenth and recorded April seventeenth. On June 30, 1890, the defendants and others, who were directors of the company, subscribed and swore to a certificate stating that the amount of capital stock paid in full was the sum of \$700,000, the full amount of the capital stock of the company.

In this action, brought against the defendants by the plaintiff to recover the debt due to him from the company, upon the ground that the said certificate was false, a judgment was entered in his favor.

*Held*, that it should be affirmed, as the evidence given upon the trial justified the jury in finding that the defendants had willfully and intentionally fabricated a false certificate. *HUNTINGTON v. ATTRILL* ..... 459

6. — *Duty of a corporation, engaged in a public business, to serve all impartially* ] In this action, brought by the plaintiff, a broker, to restrain the defendant, the Gold and Stock Telegraph Company, from removing from his office a "stock ticker," which had been placed therein by it under a contract by which the plaintiff was required to pay a rental of ten dollars per month, a temporary injunction was granted restraining the defendant from so doing during the pendency of the action.

*Held*, that the order should be affirmed.

That the defendant, being engaged in a business public in its nature, it must serve the public impartially and render equal service to all those who complied with such reasonable regulations as might be prescribed by it.

*SMITH v. GOLD AND STOCK TELEGRAPH Co.* ..... 454

7. — *When regulations established by it will be held void as unreasonable — when an injunction will be granted although damages might be recovered in an action at law.* ] By the contract under which the ticker was put in the plaintiff's office, he agreed that the defendant might discontinue its service, without notice, whenever, in its judgment, the plaintiff had violated any of the conditions of the contract.

*Held*, that this was not a reasonable regulation and afforded no defense to this action, nor was the fact that an action at law for damages would lie in the plaintiff's favor a defense thereto. *Id.*

— *Regulation of a horse railroad company as to the return of money deposited in a fare box by mistake — when unreasonable — right of a person depositing it to retain a fare received from another passenger — liability of the company for the act of its driver in causing the arrest of a passenger.*

*See CORBETT v. TWENTY-THIRD STREET RY. Co.* ..... 587

— *Liability of a corporation for slandering the business of another corporation carrying on the same business — what facts show this to have been done — a pleading should allege that the acts complained of were done by the corporation, and not by its agent.*

*See LUBRICATING OIL Co v. STANDARD OIL Co.* ..... 153

— *Contract between railroad companies to endeavor to promote each other's interests — when not void as against public policy — a plea of ultra vires will not lie in favor of a party who has received benefits under the contract.*

*See TONAWANDA R. R. Co. v. N. Y., L. E. AND W. R. R. Co.* ..... 496

— *Cashier of a bank — he may employ an attorney to collect a claim without any resolution of the board of directors, although that board has appointed an attorney and counsel to attend to its legal affairs.*

*See ROOT v. MARTIN* ..... 536

— *Action by the receiver of a corporation to determine the validity of bonds claimed to be secured by a mortgage on its property — when it can be maintained.*

*See HUBBELL v. SYRACUSE IRON WORKS* ..... 182

— *Costs — when the receiver of a corporation will be directed to pay them.*

*See LOCKE v. COVERT* ..... 484

*See ASSOCIATIONS,*

*INSURANCE,*

*RAILROAD,*

*RELIGIOUS SOCIETIES.*



**COSTS** — *Extra allowance — when it cannot be granted.*] 1. Upon the trial of this action, brought to obtain an accounting of the affairs of an alleged partnership, the court found that no partnership existed and directed that a judgment be entered in favor of the defendant, to whom it awarded costs and an extra allowance of \$2,000.

*Held*, that although ordinarily such an allowance is made in an order, and a party aggrieved thereby must review the order by an appeal therefrom, yet as the justice had included the allowance, divided among the several defendants, in his conclusions of law upon which the judgment was entered, the propriety of granting the same might be considered on the appeal from the judgment.

That as the amount of the extra allowance is to be computed upon the sum recovered or claimed, or the value of the subject-matter, and as it was decided that the plaintiff was not entitled to recover anything, and as neither the summons nor complaint stated any amount which was sought to be recovered, no extra allowance could be granted. *ADAMS v. SULLIVAN*..... 278

2. — *Effect of a notice attached to a summons that judgment will be taken for an amount named.*] That the fact that a notice attached to the summons stated that in case of a default the plaintiff would take judgment for \$35,000 was of no effect whatever, and did not show any amount claimed, as the case was one in which judgment could only be taken on application to the court. *Id.*

3. — *The right thereto is governed by the law in force at the time the right to them accrues— Code of Civil Procedure, § 3070.*] In this action, in which issue was joined in December, 1884, the plaintiff, on January 10, 1885, recovered a judgment in a Justice's Court for ninety-three dollars and ninety-two cents, from which he appealed, on January 28, 1885, to the County Court demanding a new trial. No offer of judgment was made by the respondent. On June 17, 1886, the plaintiff recovered a judgment in the County Court for eighty-nine dollars and twenty-two cents damages and thirteen dollars and ninety-eight cents interest; in all one hundred and three dollars and twenty cents. Upon an appeal from an order of the County Court setting aside a taxation of costs in favor of the plaintiff and directing costs to be taxed in favor of the defendant:

*Held*, that costs should be granted or refused in accordance with the law existing at the time when the party acquired the right to recover them.

That as this action was commenced after September, 1880, it did not fall within the exceptional provisions of subdivision 11 of section 8347 of the Code of Civil Procedure.

That the right of the parties to recover costs in this case was to be determined by section 3070 of the Code of Civil Procedure, as amended in 1885, which provides that where neither party makes an offer, the party in whose favor the verdict, upon a decision in the appellate court, is given shall be entitled to recover his costs upon appeal.

That the order of the County Court should be reversed.

*BALCOM v. TERWILLIGER*..... 170

4. — *Enforcement of a direction in an order requiring costs or money to be paid to any person — the remedy is by execution and not by attachment— Code of Civil Procedure, § 779.*] The defendant's attorney having refused to pay over money received by him as the costs of opposing a motion for a new trial, after he had been duly served with a copy of an order of an appellate court, deciding that the costs should not have been allowed to him, and ordering him to pay the money to the plaintiff or his attorney, a motion was made that an attachment issue against him, to punish him for his failure to comply with the order.

*Held*, that the plaintiff had mistaken his remedy; that he should have proceeded, under section 779 of the Code of Civil Procedure, which provides that if any sum of money, directed by an order to be paid, is not paid within the time fixed for that purpose by the order; or if no time is so fixed, within ten days after the service of a copy of the order, an execution against the personal property only of the party required to pay over the money may be issued by any party or person to whom the money is made payable by the order. *FORSTMAN v. SCHULTING* ..... 648

**COSTS** — *Continued.*

PAGE.

5. — *There must be a recovery to entitle a defendant, succeeding on some of the issues, to recover costs — Code of Civil Procedure, § 3234.*] Upon the trial of this action the court, upon the motion of the defendant's counsel, granted a nonsuit in so far as concerned two of the four counts which were contained in the complaint. The plaintiff recovered a general verdict of fifty dollars.

*Held*, that there was no recovery upon one or more of the issues on the part of the defendant which entitled him to costs, as against a plaintiff, under the provisions of section 3234 of the Code of Civil Procedure.

CROSLY v. COBB..... 166

— *Action to compel an accounting by a general assignee — right of other creditors to come in after judgment and prove their claims — they cannot be compelled to contribute their share of the costs and expenses — costs and expenses of plaintiff, how paid.*

See MATTER OF LEWIS v. HAKE..... 542

— *Proceedings for the sale of the real estate of a decedent to pay his debts — the costs cannot be allowed by the surrogate until the proceeds of the sale have been paid to the county treasurer.*

See MATTER OF LAIRD v. ARNOLD..... 136

— *Refusal of an executor or administrator to consent to refer a claim — when the claimant is entitled to recover costs — effect of the certificate of the judge or referee as to the refusal to refer — Code of Civil Procedure, § 1836.*

See ELY v. TAYLOR..... 205

— *Infant — when allowed to avoid a transfer of stock belonging to her, and bearing her signature — extra allowances — the court cannot presume bank stock to be worth more than its par value.*

See SMITH v. BAKER..... 504

— *Reference of a disputed claim against the estate of a deceased person — rights to costs and disbursements and an extra allowance*

See HOPKINS v. LOTT..... 442

— *Offer of judgment on appeal from a judgment in a Justice's Court — right of the party accepting it to costs — Code of Civil Procedure, § 3070.*

See HOLLENBACK v. KNAPP..... 207

— *When the treasurer of a village is its chief fiscal officer, within the meaning of section 3245 of the Code of Civil Procedure.*

See FISHER v. VILLAGE OF CORTLAND..... 173

— *When a receiver of a corporation will be directed to pay them.*

See LOCKE v. COVERT..... 484

**COUNSELOR** — *Admissibility of the testimony of counsel as to communications had with a deceased person whose will he drew — Code Civ. Pro., §§ 835, 836.*

See MATTER OF AUSTIN..... 516

**COUNTER-CLAIM.**

See PLEADINGS.

SET-OFF.

**COUNTY** — *Right of a board of supervisors, compelled to advertise for proposals and to award the contract to the lowest bidder, to reserve a right to reject bids — 1884, chap. 230, § 3.*] Section 3 of chapter 230 of 1884, providing for the purchase of a county farm and the erection of buildings thereon by the board of supervisors of Kings county, directs that whenever the plan and specifications shall be approved by the said board of supervisors "it shall advertise, as now provided by law, for proposals for the erection of the buildings and improvements thereby contemplated to be erected and made, and shall award the contract to the lowest responsible bidder or bidders." Under this act the board advertised for sealed proposals and reserved the right to reject any and all bids. The relator and others submitted proposals for separate portions of the work. A portion of the work was awarded to the relator, but a number of his bids were rejected.

Claiming that the board had no power to annex to their advertisement the condition reserving the right to reject any and all bids, the relator moved

**COUNTY — Continued.**

PAGE.

for a peremptory *mandamus* to compel the board to accept the rejected bids.

*Held*, that even if the board had no authority to annex this condition, yet, as it did in fact do it, the relator, who made his bids under the advertisement containing it, could not complain that the board exercised the right so reserved against him.

That the statute was intended to be beneficial to the county, and if such a construction could be spelled out of its terms, it was the duty of the court to be sedulous in giving it such an interpretation.

*It seems*, that the fair interpretation of the act is that when the contract is awarded it shall be to the lowest bidder.

PEOPLE EX REL. CARLIN v. SUPERVISORS..... 456

**COUNTY COURT:**

*See* COURTS.

**COURTS — Practice—** *power of the court to order a reference to take testimony as to facts and to refuse to enter an interlocutory judgment.*] 1. In this action, brought to foreclose a mortgage given by the defendant railway company to secure an issue of bonds, amounting to the sum of \$4,000,000, the right of the plaintiff to this relief was resisted by the railway company and other defendants, who denied the legal validity of the bonds. Upon a trial of the issues raised by the pleadings, the court concluded that the bonds had been unlawfully issued, and that they were voidable at the election of the railway company, with the exception of those which had passed into the hands of holders for value, without notice, and made an order of reference directing the referee to inquire who were the holders of the bonds in controversy, and for what they had been acquired, and what consideration had been paid for the bonds by their present or preceding holders.

*Held*, that an objection to the order, founded upon the claim that the court, having reached the decision that it did, should have directed that an interlocutory judgment be entered embodying findings of fact and law which might be reviewed by the parties by way of an appeal or a motion for a new trial, should not be sustained, as the system of practice now existing did not require that an interlocutory judgment should be entered as the result of such a decision, but permitted the court to hear the case fully and completely and determine the same by a final decree.

CENTRAL TRUST Co. v. N. Y. CITY AND NORTHERN RY. Co..... 603

2. — *Such an order is appealable — Code of Civil Procedure, § 1347, sub. 4.*] That the order affected a substantial right, and was reviewable upon the merits upon an appeal taken under subdivision 4 of section 1347 of the Code of Civil Procedure. *Id.*

3. — *Submission of a case upon agreed facts—Code of Civil Procedure, § 1279 — power of the court to amend the agreement as to the relief to be granted — when the power will not be exercised.*] A case having been agreed upon and submitted to the court, under the authority of section 1279. of the Code of Civil Procedure, a judgment was ordered in favor of the plaintiff for the recovery of damages because of the unlawful interference of the defendants with the plaintiff's property, consisting of a bulkhead and wharf fronting upon the Hudson river, pursuant to a provision in the agreement defining the relief to which the plaintiff would be entitled if successful. After this decision had been made, and the judgment had been entered upon it, it was stated that the Court of Appeals had decided that the owners of the wharf were entitled to the structure erected in front of it by the city, thereby extending their water front so much further into the river.

*Held*, that a motion made by the plaintiff to amend the claim for relief in the case submitted, so as to secure to him the benefits of this decision by awarding to him the possession of the additional structure itself, instead of damages for the act of the defendants, should be denied, as it would not be a provident use to make of any power which the court might possess to grant such amendments, to interfere with and change this part of the agreement, after the case itself had been heard and decided, and the rights and obligations of the parties had been declared and defined by the judgment which has been entered.

**COURTS— Continued.**

PAGE

*It seems*, that the court had no authority to change that part of the agreement made by the parties, as to the relief which should be awarded to the plaintiff, in case it should be held that he was entitled to recover.

KINGSLAND v. MAYOR, ETC. .... 599

4. — *Statute of limitations*—*when a judgment of the New York Marine Court is deemed to be a judgment of a court of record, although the court was not a court of record at the time of its entry.*] On December 6, 1868, a judgment was recovered against the defendant in this action in the Marine Court of the city of New York. At that time that court was not, except in a limited sense and for certain purposes, a court of record, but it was, by chapter 629 of 1872, made a court of record to and for all intents and purposes.

*Held*, that the judgment was that of a court of record, which would not be presumed to have been paid until after the expiration of twenty years from the time of its recovery. CAMP v. HALLANAN. .... 628

— *Appeal to the County Court from a justice's judgment—the right to a new trial is determined by the amount demanded in the amended complaint, and not by that asked for in the original pleadings—Code Civ. Pro., § 3068—what counter-claim cannot be pleaded in an action of tort—when an amount exceeding fifty dollars claimed thereby will not justify a new trial on appeal.*

See HINKLEY v. TROY AND ALBIA R. R. Co. .... 281

— *Receiver of a corporation—power of the court to direct him to issue certificates to pay wages due to employees—when they cannot be made to affect a prior lien by mortgage.*

See RAFT v. ATTRILL. .... 414

— *Error in the charge of the court as to the measure of damages—an exception thereto will not be sustained, when the charge was based upon a fact the existence of which was assumed by the court and both parties upon the trial.*

See VAIL v. REYNOLDS. .... 647

— *Sale by assignees in bankruptcy under the United States statute, chapter 9 of 1841—power of the court to order a private sale without specifying the time thereof.*

See GIGNOUX v. STAFFORD. .... 426

— *Bond of a marshal of the city of New York—a party aggrieved cannot, under an order of a justice of the Court of Common Pleas, prosecute it in the Supreme Court—1862, chap. 484.*

See MOOG v. KEHOE. .... 494

— *Power of the court to correct erroneous assessments on the hearing of a certiorari to review them.*

See PEOPLE EX REL. NEUSTADT v. COLEMAN. .... 581

— *Power of a Special Term to entertain a resolution to vacate an order erroneously granted.*

See FIRST NAT. BANK v. CLARK. .... 90

— *Contempt of.*

See CONTEMPT.

See SURREGATE.

**COVENANTS**—*Lease of lands to be used for the purpose of boring for oil or gas—construction of covenants contained in it—when a covenant will be held void for uncertainty.*

See EATON v. WILCOX. .... 61

**CREDITOR:**

See DEBTOR AND CREDITOR.

**CREDITOR'S SUIT**—*Action by a creditor to set aside a fraudulent conveyance made by a debtor—it cannot be maintained by a general creditor—proof of the non-payment of a claim, allowed by the legal representatives in another State, does not show that the plaintiff has exhausted his legal remedies—although the law of that State will not permit a suit to be brought.*

See NATIONAL TRADESMAN'S BANK v. WETMORE. .... 359

**CREDITOR'S SUIT** — *Continued.*

PAGE.

— *Action to compel an accounting by a general assignee — right of other creditors to come in after judgment and prove their claims — they cannot be compelled to contribute their share of the costs and expenses — costs and expenses of plaintiff, how paid.*

*See* **MATTER OF LEWIS v. HAKE** ..... 542

**CRIMES** — *Amendment to the United States Constitution requiring the accused to be confronted with the witnesses against him — not applicable to trials in State courts for State offenses.]* 1. Upon the second trial of the defendant for the crime of extortion the people were allowed, against the defendant's objection and exception, to read in evidence the testimony of a witness who had been produced and examined on the former trial, but who was dead at the time of the second trial.

*Held*, that an objection to the admission of the evidence, as being a violation of the sixth article of the amendment of the Constitution of the United States, providing that in all criminal prosecutions the accused should be confronted with the witnesses against him, was not well taken, as the right secured by this clause of the Constitution is limited in its application to citizens of the United States on trial in the Federal courts charged with a violation of the Constitution of the United States or the laws of Congress.

**PEOPLE v. PENHOLLOW** ..... 103

2. — *Construction of this provision in the bill of rights of the State of New York.]* That the similar provision contained in the bill of rights of the State of New York did not require that the accused should in all cases be confronted with the witnesses against him upon a pending trial of the indictment, but is satisfied, in cases of necessity, if the accused has been once confronted by the witness against him, in any stage of the proceedings upon the same accusation; and has had an opportunity of a cross-examination by himself or by counsel in his behalf. *Id.*

3. — *Right of the accused to testify as to a conversation with a witness who has testified as to a confession made by him.]* The offense consisted in extorting from one Reuby the sum of five dollars to prevent his arrest for stealing one dollar from one Sliker. The people called as a witness one Kapple, who testified to the confessions of the prisoner made to him at a time and place mentioned by the witness. He testified, in substance, that the prisoner admitted to him some of the facts and circumstances upon which the people relied to secure a conviction; and he further stated that the prisoner said that his purpose in exacting the five dollars from the prosecutor was to secure revenge, and as the opportunity occurred he took advantage of it and redressed a wrong which the prosecutor had done him on a former occasion. The prisoner having been called as a witness in his own behalf, was asked by his counsel to state the conversation which he had with Kapple. An objection by the people's counsel, interposed without any reason being stated therefor, was sustained by the court, which stated to the prisoner that any conversation which he had with Kapple in reference to the payment of the money, or in regard to the motive in going to the house of the prosecutor, was proper, but anything further was not.

*Held*, that the limitation thus placed on the right of the prisoner to state as a witness all the conversation which he had with the witness Kapple was erroneous, as he had a right to give his version of the interview and all the conversation which passed between the parties as he claimed it to be. *Id.*

4. — *Right of the accused to cross-examine a witness in order to show bias against him.]* On the cross-examination of Kapple he stated that he was not fond of the defendant, and that he did not speak kindly to him. He was asked: "Did you tell Penhollow last week that he was guilty and you knew it?" Upon a general objection interposed by the district attorney the court refused to allow the witness to answer.

*Held*, error; that the defendant had the right to put the question as bearing upon the question as to whether the witness had any bias, prejudice or hostility against him.

That his right so to do was not affected by the fact that the witness had already admitted that he did not feel kindly to the defendant, as the latter had the right to show when, where and the peculiar circumstances under

## CRIMES — Continued.

PAGE.

which the witness had displayed his prejudice and bias, so that the jury might the better determine in what degree, if any, the witness' credibility had been impeached. *Id.*

5. — *Indictment for perjury — the falsity of the facts sworn to by the accused, must be averred therein.* [The defendant was convicted of the crime of perjury in willfully swearing, to the best of his knowledge and belief, to the truthfulness of a quarterly report made to the banking department of the State, by the State Bank of Fort Edward, of which bank he was the cashier, which report purported to contain a true statement of the condition of the bank on a certain day therein named. Upon an appeal from the judgment of conviction, it appeared that the indictment did not charge, by direct averments, that the statement made in the report and schedule thereto attached on which the crime of perjury was founded were, or that either of them was, false or untrue; that while it averred, in various forms, that the defendant had knowledge that these statements were false and untrue, it did not directly aver that they were or that either of them was, in point of fact, false and untrue.

*Held*, that the omission of this allegation was a fatal defect, which required the judgment to be reversed and the defendant to be discharged.

PEOPLE v. CLEMENTS. . . . . 353

6. — *Evidence of good character — must be considered by the jury in all cases.* Upon the trial, evidence was given by the prosecution and by the defendant, tending to sustain and refute, respectively, the charge that the defendant committed the crime in swearing to the truthfulness of the report. Evidence was also given showing the defendant to have been of good character in all respects, and no evidence was given or offered to gainsay this fact. The judge, in his charge to the jury, said that "such proof is always admissible on a criminal trial, but it is not a defense. When the crime is sufficiently established it is not entitled to any influence." After referring to other cases in which evidence of good character was entitled to great weight, as in those in which it was uncertain by whom the offense had been committed, he added: "If you become convinced that this report, the subject of this indictment, was false; that defendant, at the time, knew it to be false, then previous good character is of no avail whatever." On being asked to charge "that evidence of good character is required to be considered by the jury on the question of guilt," he declined to charge any differently from what he had already charged.

*Held*, that he erred in so doing. *Id.*

7. — *Criminal pleadings — what must be alleged in an indictment in order to justify a conviction of grand larceny, for obtaining goods under false pretenses, under section 523 of the Penal Code.* The defendant was convicted of the crime of grand larceny upon an indictment which charged that the defendant, on February 8, 1885, at the city of Rochester, in the county of Monroe, a quantity of carpets, rugs and hassocks, particularly describing them, of the value of \$671, of the goods, chattels and personal property of Ilus F. Carter, then and there being found, unlawfully and feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

Upon the trial the district attorney was allowed to introduce evidence tending to show that the defendant purchased the goods of Carter, giving therefor his promissory notes indorsed by one Hensler, Carter being induced to sell the goods by an affidavit made by Hensler, showing that he then owned two farms worth \$5,000, subject to a mortgage on one of \$900, and that the total of his other liabilities did not exceed \$65; that this affidavit was false, and was known by the defendant to be so at the time that he presented the same to Carter in order to induce him to sell the goods upon credit.

*Held*, that an objection made by the defendant's counsel, to the admission of the evidence tending to show false representations, was properly overruled by the court, and that a motion to discharge the defendant upon the ground of variance between the proof and the indictment was properly denied.

**CRIMES—Continued.**

PAGE.

That the charge that the defendant, the said goods, "unlawfully and feloniously did steal, take and carry away contrary to the form of the statute in such case made and provided," was a sufficient description of the act to satisfy the provision of section 528 of the Penal Code, which requires, to constitute the crime of larceny, an intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker or any other person.

That as the indictment charged that the defendant did "steal," take and carry away the goods, and as the statute (§ 528) defined the act of obtaining goods by false pretenses as stealing them, the indictment was sufficient, as it charged the act and was not required to describe the means by which the act was accomplished. **PEOPLE v. DUMAR** . . . . . 80

8. — *The opinion of a witness, as to who is the person alluded to in a libelous publication, is not admissible*.] Upon the trial of the defendant for an alleged libel upon one Leo Oppenheim, it appeared that Oppenheim's name was not mentioned in the libel, but it was claimed by The People that he was the person intended, and that he was pointed out by the words "the Pearl street tailor" and by the name "Leo." A witness, called by The People, who was asked, "When you read this article did you recognize its application to any particular individual?" answered "I did." To the question, "Who was the person that you recognized that this article referred to?" he answered "Leo Oppenheim."

*Held*, that the court erred in admitting the evidence against the objection and exception of the defendant.

That it was for the people to show facts from which the jury might infer that Oppenheim was the person intended by the defendant, and that the opinion of the witness should not have been received. **PEOPLE v. PARR** . . . . . 318

9. — *Meaning of the term "infamous crime"—a libel is not one.*] Libel is not an "infamous crime" within the meaning of that term as used in section 68 of the Code of Civil Procedure, conferring upon the Court of Special Sessions, in the city of Albany, jurisdiction to try and determine all cases of petit larceny charged as a first offense, and all misdemeanors, "not being infamous crimes," committed within the city. *Id.*

10. — *Overdrawing of his account, by a bank officer—what must be shown to justify his conviction under section 600 of the Penal Code.*] To authorize the conviction of an officer of a bank indicted for knowingly overdrawing his account and thereby obtaining \$690 in money in violation of the provisions of section 600 of the Penal Code, which declares that "an officer, agent, teller or clerk of any bank, \* \* \* who knowingly overdraws his account with such bank, and thereby wrongfully obtains the money, notes or funds of such bank, is guilty of a misdemeanor," the fact that he did by means of the check, by which his account is alleged to have been overdrawn, wrongfully obtain the money, must be proved by the prosecution.

Proof of the possession by the bank of his check at a time when his account is overdrawn, although sufficient to presumptively show a credit in favor of the bank, on an accounting between the bank and the defendant, will not justify his conviction in a criminal action.

The transaction must be shown by which the defendant delivered the check to the bank and obtained the money therefor.

The mere fact that an officer of the bank has knowingly overdrawn his account, will not justify his conviction, unless it be shown that the money thereby obtained was "wrongfully obtained," as the word "wrongful" in the statute implies more than the mere want of funds in the bank.

**PEOPLE v. CLEMENTS** . . . . . 396

— *Actions in tort—a several judgment may be rendered against one of several defendants—liability of a corporation for slandering the business of another corporation carrying on the same business—what facts show this to have been done—a pleading should allege that the acts complained of were done by the corporation and not by its agent.*

*See* **LUBRICATING OIL CO. v. STANDARD OIL CO.** . . . . . 153

— *Provision avoiding an insurance policy in case the assured shall die in the violation of, or the attempt to violate, any criminal law—the assured does not violate such a provision by committing suicide—Penal Code, §§ 173, 178.*

*See* **DARROW v. FAMILY FUND SOCIETY** . . . . . 245

**CRIMES — Continued.**

PAGE.

— *Confession of a prisoner — not admitted when induced by a promise that the accused shall obtain the benefit of a State's witness — when the question whether such promise was made should be submitted to the jury — Code of Criminal Procedure, § 895.*

See **PEOPLE v. KURTZ**..... 335

— *Civil rights — an owner of a skating rink refusing to sell tickets to a colored person is guilty of a misdemeanor — Penal Code, § 383.*

See **PEOPLE v. KING**..... 186

— *Charter of the city of Elmira — over what offenses exclusive jurisdiction is conferred on the recorder.*

See **PEOPLE EX REL. MILLER v. COOPER**.... 196

— *Order granting a new trial, after a conviction of a crime, upon the ground of newly discovered evidence — the people cannot appeal therefrom.*

See **PEOPLE v. BECKWITH**..... 366

— *Will — the right of a devisee to take thereunder is not affected by the fact that he wilfully murdered the testator.*

See **PRESTON v. PALMER**..... 388

See **CONTEMPTS**.

**CURTESY — Tenant by.**

See **HUSBAND AND WIFE**.

**CUSTOM:**

See **USAGE**.

**DAMAGES** — *Examination of witnesses as to the amount thereof — what questions are allowable.] Upon the trial of this action, brought to recover damages done by cattle trespassing upon the plaintiffs' premises and injuring the vines, currant bushes and fruit trees upon them, one of the plaintiffs, after testifying to the breaking of the limbs of the trees and the destruction of the vines and shrubs, was permitted, against the defendant's objection and exception, to answer the questions, "What was the value of the trees; what was the amount of damage you saw done them?" by saying, "Well, \$200."*

*Held*, that no error was committed in allowing the question to be put and answered.

Another witness, who had given with great minuteness the items of injury and stated that he knew the value of the lands, was asked and allowed to answer what the amount of damage was.

*Held*, no error.

Another witness, who had stated the injury, on being asked as to its extent, replied: "If it was on my own land, I would hate to have it done for a couple of hundred of dollars."

*Held*, that the court did not err in refusing to strike out the answer.

**ROGERS v. ANSON**..... 436

— *Duty of a corporation, engaged in a public business, to serve all impartially — when regulations established by it will be held void as unreasonable — when an injunction will be granted although damages might be recovered in an action at law.*

See **SMITH v. GOLD AND STONE TELEGRAPH CO.**..... 454

— *Easement of light from a street — right of an abutting owner to recover damages for an interference with it — when one erecting and leasing an elevated road is liable for damages occasioned by the running of trains by the lessee of the road.*

See **POND v. METROPOLITAN ELEVATED RY. CO.**..... 567

— *Representations on a sale of chattels — when they constitute a warranty, which survives the acceptance of the goods — a rule of damages will be followed notwithstanding proof that the vendee sustained none.*

See **HUNT v. VAN DEUSEN**..... 393

— *Civil damage act — 1873, chap. 646 — when exemplary damages may be recovered against the lessor.*

See **REID v. TERWILLIGER**..... 310



**DAMAGES** — *Continued.*

PAGE.

— *Contempt of court* — actual loss or injury must be proved to support a fine to indemnify the party injured, imposed under section 3281 of the Code of Civil Procedure.

See **FALL BROOK COAL CO. v. HECKSHER**..... 584

— *Contract for the construction of a railroad* — right to recover as damages for a breach of a contract profits which would have been received if the contract had been completed — such damages are not recoverable when the breach complained of is simply a failure to pay an installment of money due by the terms of the contract.

See **MOORE v. TAYLOR**..... 45

— *Error in the charge of the court as to the measure of damages* — an exception thereto will not be sustained when the charge was based upon a fact, the existence of which was assumed by the court and both parties upon the trial.

See **VAIL v. REYNOLDS**..... 617

— *When one tenant in common may recover for use and occupation, from a co-tenant who excludes him from the possession of the premises.*

See **MULDOWNEY v. MORRIS AND ESSEX R. R. CO.**..... 444

— *What provisions in a contract will be construed as liquidating the damages, and not as fixing a penalty.*

See **PARR v. VILLAGE OF GREENBUSH**..... 232

**DEBTOR AND CREDITOR** — *Action by a creditor to set aside a fraudulent conveyance made by a debtor* — it cannot be maintained by a general creditor.] 1. Upon the trial of this action, brought by the plaintiff to set

aside as fraudulent, as against his creditors, a conveyance of certain lands made by one Wetmore to the defendant, his wife, it appeared that the said Wetmore, a resident of Connecticut, in 1882, and while indebted to the plaintiff, a national bank carrying on business in that State, as an indorser of certain promissory notes discounted by the bank for Wetmore, conveyed an interest owned by him in certain real estate, situated in the State of New York, to his wife through a third person. On February 19, 1888, Wetmore made a general assignment for the benefit of creditors, which, by the laws of Connecticut, did not convey any title to or interest in lands out of that State. While suits brought against Wetmore upon the said notes were pending, he died, and the plaintiff being prevented by the laws of Connecticut from obtaining a judgment against the representative of an insolvent estate, proved its claim against the commissioners appointed under the laws of Connecticut, who allowed the same, but paid no part of it.

*Held*, that as the plaintiff was simply a creditor-at-large of Wetmore, he had no standing in court to demand the relief sought.

**NATIONAL TRADESMAN'S BANK v. WETMORE**..... 359

2. — *Proof of the non-payment of a claim, allowed by the legal representatives in another State, does not show that the plaintiff has exhausted his legal remedies — although the law of that State will not permit a suit to be brought.]* That the proceedings against the estate of the insolvent merely settled and determined the amount due, and did not amount to a judgment, and that, even if it were deemed a judgment, there had been no execution issued thereon.

*Quere*, as to whether a judgment recovered in another State, with execution thereon unsatisfied there, would aid the plaintiff's case. *Id.*

3. — *Action to compel an accounting by a general assignee — right of other creditors to come in after judgment and prove their claims.]* After an action, brought by a judgment creditor to compel a general assignee to account, had been sent to a referee to take and state the accounts of the assignee and ascertain the amounts due and owing to the creditors of the debtor, other creditors applied for an order allowing them to intervene and be made parties plaintiff.

*Held*, that the application was properly denied, as it was not necessary that the applicants should be brought into the action as additional plaintiffs, as the action, though brought by one creditor, was in reality for the benefit of all the other creditors as well as for himself, the judgment in such actions being uniformly required to provide for bringing in all the other creditors and affording them an opportunity to present and prove their

**DEBTOR AND CREDITOR—Continued.**

PAGE.

demands and participate in the distribution of the estate under the final judgment. *MATTER OF LEWIS v. HAKE*..... 542

4. — *They cannot be compelled to contribute their share of the costs and expenses.*] A provision in a judgment entered in such an action, imposing as a condition upon which creditors were to be allowed to come in and prove their claims, that they should contribute their proportion of the costs and expenses of the action to be settled by the referee, is unauthorized and will not be enforced. *Id.*

5. — *Costs and expenses of plaintiff, how paid.*] It seems, that in such a case a proper allowance for the costs and disbursements of the plaintiffs will be made in the final judgment to be paid out of the fund. *Id.*

— *Reference of a disputed claim against the estate of a deceased person is a special proceeding— an appeal should be taken from the order of the Special Term confirming the referee's report, and not from the judgment— the plaintiff is entitled to recover his disbursements, as a matter of right, under section 317 of the Code of Procedure, which was not repealed by chapter 417 of 1877.*

*See HATCH v. STEWART*..... 164

— *Right of one partner to transfer firm property, in consideration of an agreement by the purchaser to pay a certain percentage upon the firm debts— when it will be sustained as against objecting creditors— a condition that the amount to be paid shall be received in full of the debt would invalidate it.*

*See CHADWICK v. BURROWS*..... 39

— *Action of replevin to recover goods fraudulently obtained— right of the vendors to deduct, from the amount received for the property sold by him, the value of that portion of the property which could not be replevied and the depreciation in the value of the portion replevied— an assignee for the benefit of creditors cannot object to the failure of the plaintiffs to make a tender to the assignor.*

*See SCHOONMAKER v. KELLY*..... 299

— *Proceedings for the sale of the real estate of a decedent to pay his debts— what allegations the petition should contain when made by a creditor— the cost of a tombstone is to be treated as part of the funeral expenses— costs cannot be allowed by the surrogate until the proceeds of the sale have been paid to the county treasurer.*

*See MATTER OF LAIRD v. ARNOLD*..... 136

— *Diversion of a promissory note from the use to which it was to have been applied— when that fact may be set up by the maker as a defense to an action brought by a transferee of the note, receiving the same as collateral to a pre-existing indebtedness.*

*See AYERS v. DOYING*..... 680

— *Levy upon property under an attachment— right of the sheriff to deny the defendant's title to the property in an action for a false return brought by the plaintiff in the attachment suit— when a sale of the property of an insolvent company will be held void.*

*See THIRD NAT. BANK v. ELLIOTT*..... 121

— *General assignment— firm creditors may be preferred to individual creditors— the surviving partner may make a general assignment— debts contracted by a surviving partner are his individual debts.*

*See HAYNES v. BROOKS*..... 528

— *Set-off— when allowed in equity as against an assignee, where the debt sought to be set-off was not due at the time of the making of a general assignment by the insolvent debtor.*

*See ROTHSCHILD v. MACK*..... 72

— *Receiver of insolvent insurance company— duty of, as to payment of unpreferred claims— no deduction for payments made before his appointment can be made.*

*See PEOPLE v. UNIVERSAL LIFE INS. CO.*..... 616

— *Fraudulent assignment— it must be set aside if any part thereof was made with intent to defraud.*

*See NATIONAL BANK OF GRANVILLE v. COHN*..... 381

**DEBTOR AND CREDITOR — Continued.**

PAGE.

- *Extension of time of payment of a debt — not necessarily effected by the acceptance, as collateral security, of accounts not then due.*  
*See WHEELER v. JONES* ..... 374
- *Enforcement of a direction in an order requiring costs or money to be paid to any person — the remedy is by execution, and not by attachment — Code of Civil Procedure, § 179.*  
*See FORSTMAN v. SCHULTING* ..... 643
- *Release of premises from the lien of a mortgage — when the court will not revive the mortgage in favor of the owner of the premises, as against the widow of a mortgagor claiming dower therein.*  
*See EVERSEN v. McMULLEN* ..... 369
- *Sale by assignees in bankruptcy under the United States Statute, chapter 9 of 1841 — power of the court to order a private sale without specifying the time thereof.*  
*See GIGNOUX v. STAFFORD* ..... 426
- *Receiver in supplementary proceedings — the title to only such real estate of the debtor as lies within this State is vested in him.*  
*See SMITH v. TOZER* ..... 22  
*See ASSIGNMENT.*

**DECEDENT** — *Reference of a disputed claim against his estate.*  
*See REFERENCE.*

**DECLARATION** — *Of a former owner — admissibility of.*  
*See EVIDENCE.*

**DEDICATION** — *Of a street — an acceptance on the part of the city must be shown — the acceptance must be subject to all existing burdens.*  
*See CITY OF COHOES v. MORRISON* ..... 216

**DEEDS** — *When one executed by an attorney, "Francis Meriam, attorney, by Eliza Meriam," will be held to pass the title of Eliza Meriam, the principal.]*  
 1. A deed began: "This indenture, made the ninth day of June, one thousand eight hundred and seventy-four, between Eliza Meriam of \* \* \* by Francis Meriam, her attorney, under and by virtue of a certain power." The attestation clause was as follows: "In witness whereof the said party of the first part by her attorney has hereunto set her hand and seal the day and year first above written." It was signed "Francis Meriam, attorney, by Eliza Meriam."  
*Held*, that as the instrument showed, by its terms, that it was the deed of Eliza Meriam who was the owner of the fee, it conveyed a good title.  
*ROBBINS v. AUSTIN* ..... 469

2. — *Grant of lands by the crown — construction of it — the town of East Hampton took title under the grant from the crown.]* The tract of land which now constitutes the town of East Hampton was granted by the crown to the town and not to the persons called the "proprietors," who had bought the tract from the Indians, and a valid title to any land therein must be derived from the town and not from the said "proprietors." *ATKINSON v. BOWMAN*.. 404

— *The recital in a sheriff's deed that an execution has been issued does not prove that fact.*  
*See HASBROUCK v. BURHANS* ..... 376

**DE FACTO OFFICERS:**  
*See OFFICERS.*

**DEFINITION** — *Construction of an agreement — when the words "legal representatives" means executors and administrators, and not next of kin.*  
*See GREENWOOD v. HOLBROOK* ..... 633

**DE JURE OFFICERS:**  
*See OFFICERS.*

**DEPOSIT** — *In a bank by a life tenant, of moneys received under an insurance policy on a mill — when it will be considered, as between two remaindermen in whose names the deposit was made, as personal property.*

See *JAGGER v. BIRD*..... 423

**DEVISES** — *Will — when residuary legatees and devisees do not become personally liable for legacies the payment of which is charged on the residuary estate — statute of limitations — when the right to foreclose a lien to secure a legacy charged on the property is not barred by it.*

See *QUACKENBUSH v. QUACKENBUSH*..... 329

— *Election — a devisee, by electing to take under a will, waives a right to enforce a claim inconsistent with its other provisions.*

See *HAACK v. WEICKEN*..... 486

**DISCOVERY** — *Inspection of books and papers — an order compelling their production will not be granted unless it is needed to enable the party to present his own case.] This action, brought to recover the amount found to be due to the plaintiff from the defendants on a settlement of the accounts of the parties, was defended upon the ground that the settlement was obtained by fraud, duress and coercion, and the defendants asked that it be set aside.*

Upon an appeal from an order granting an application made by the plaintiff for a discovery and inspection of certain books and papers, the defendants claimed that the only question to be tried was whether the defendants gave up certain securities and signed the agreement through fear, duress and fraud practiced on the part of the plaintiff.

*Held*, that as an examination of the pleading, taken in connection with the declaration of the defendants' counsel, made in open court upon the submission of the appeal herein, showed that the plaintiff's claim was proved *prima facie*, and that as it was not necessary for the presentation of his case in the first instance that the plaintiff should be permitted to make any examination, the order should be reversed. *SANGER v. SEYMOUR*..... 641

**DISCREDITING** — *A witness.*

See *WITNESS*.

**DISCRETION** — *Licenses for places of amusement — in Albany a discretionary power is vested in the mayor — 1883, chap. 298, tit. 3, § 14, subs. 15 and 20 — when its exercise will not be reviewed by the court.*

See *PEOPLE EX REL. DORR v. THACHER*..... 349

**DOMICILE** — *When acquired by an inmate of the Soldiers and Sailors' Home at Bath.] In 1880 the plaintiff, a discharged soldier, who was then a resident of the city of New York, was admitted as an inmate into the institution known as the "New York State Soldiers and Sailors' Home," located in the town of Bath. He was not a pensioner under the laws of the United States, and was supported at the home wholly at public expense. In becoming an inmate of the institution he intended to change his residence from the city of New York to the town of Bath, and to make his residence in said institution so long as he should be permitted to remain there as an inmate.*

*Held*, that he acquired a residence in the town of Bath which authorized him to vote at an annual town meeting held in that town.

*Quare*, as to whether the Soldiers and Sailors' Home was an "asylum" within the meaning of that term, as used in section 8 of article 2 of the Constitution, which declares that "for the purpose of voting no person shall be deemed to have gained or lost a residence, by reason of his presence or absence \* \* \* while a student of any seminary of learning, nor while kept at any almshouse or other asylum at public expense."

*SILVEY v. LINDEAY*..... 118

**DOWER** — *Admeasurement of — question as to whether a specific parcel of land can be set aside.] 1. In this action, brought to recover dower in certain real estate claimed to be owned by and to be in the possession of the defendant, defenses were interposed, to hear, try and determine which a reference was ordered. In the pleadings there was no issue joined as to the practicability of an actual admeasurement of a specific portion of the land to the plaintiff*

**DOWER** — *Continued.*

PAGE.

for her dower, the only allusion thereto being in the alternative relief demanded in the plaintiff's prayer for judgment. Upon the trial the referee, against the objection and exception of the defendant, received evidence tending to show that the property was so situated that a distinct parcel could not be admeasured to the plaintiff without injury to her rights, and upon the evidence so received found that a distinct parcel of the property could not be admeasured to the plaintiff without material injury to her interests, and directed that the premises be sold.

*Held*, that the question of the practicability of an actual admeasurement of the plaintiff's dower was not one to be tried by the referee, and that the direction for the sale of the property being unauthorized should be stricken from the report. *O'DOUGHERTY v. REMINGTON PAPER CO.*..... 192

2. — *At what time and in what manner it must be determined.*] Although, in the case of a trial by the court, the question of actual admeasurement of dower might be investigated and decided so that the rights of the parties, and the necessity of a sale and the interlocutory judgment, could all be determined on a single hearing, yet this course could seldom be pursued as the feasibility of an actual partition could not generally be denied without a visible examination of the lands by the court, referee or commissioners, and for the further reason that as the possibility of an actual partition might often greatly depend upon the rights of the several parties, as determined on the trial, the question could not be intelligently considered until such determination had been made.

In all cases (except, perhaps, when the trial is by the court, which finally orders the interlocutory judgment), a reference must be had to ascertain whether actual admeasurement or partition can be made, after a decision of the referee as to the rights of the parties under the issue and before the judgment declaring such rights is entered. *Id.*

3. — *The rights of all the parties must be considered* — *Code of Civil Procedure*, §1619.] In order to authorize a sale of the property it must be shown that a distinct parcel of the property cannot be admeasured and laid off to the plaintiff, as tenant in dower, "without material injury to the interests of the parties." It is not sufficient to show that one of the parties would be injured by an actual partition. *Id.*

**EASEMENT** — *A purchaser of a servient tenement is not bound by an easement not disclosed by deeds or apparent use.*] In 1850 a farm, consisting of 170 acres, was partitioned by a parol agreement between two brothers, Elijah and John, who owned it as tenants in common; seventy acres were set apart to Elijah and 100 acres to John, it being agreed that Elijah and his heirs and assigns were to have the right to enter annually upon the portion assigned to John and gather one-half of the apples growing in an orchard which was situated thereon. In pursuance of his agreement, Elijah and those claiming under him annually entered upon the said 100 acres and gathered one-half of the apples, without objection on the part of those owning and using the same, until the fall of 1884, when the plaintiff, who had in March, 1880, purchased the said 100 acres from a person to whom John had conveyed them in 1870, objected to the taking of the apples, and brought this action to recover the damages occasioned thereby.

*Held*, that, as there was nothing in either of the conveyances, nor in the apparent use of either of the tenements by their respective owners, showing or indicating the actual existence of the right now insisted on, and as the plaintiff was bound only by what the record disclosed, he was protected in his absolute title by the recording act. *TAYLOR v. MILLARD.*..... 303

— *Of light from a street* — *right of an abutting owner to recover damages for an interference with it.*

See *POND v. METROPOLITAN ELEVATED RY. CO.*..... 567

**EAST HAMPTON** — *Grant of lands by the crown* — *construction of it* — *the town of East Hampton took title under the grant from the crown.*

See *ATKINSON v. BOWMAN.*..... 404

**ELECTION** — *A devisee, by electing to take under a will, waives a right to enforce a claim inconsistent with its other provisions.*] Upon the trial of this

**ELECTION — Continued.**

PAGE.

action, brought to reform a deed executed to the plaintiff's husband, Heinrich A. Haack, pursuant to an agreement for the partition of land devised by the plaintiff's father to his four children, it was shown that the intention was that the property described therein should be conveyed to the plaintiff and her husband, and that the latter should pay \$10,000 (one-half the value of the property) to another devisee. By the directions of the plaintiff's husband the deed was so made out as to convey the whole of the property to him, the name of the plaintiff being wholly omitted therefrom, which fact was not known to her or the party who executed the deed, he having neglected to read it, or to the other parties to the partition agreement, until after the death of the husband, which occurred several years after his receipt of the deed.

The husband left a will by which he gave and devised to the plaintiff a dwelling-house and property in Brooklyn, together with the sum of \$10,000, and declared these provisions to be in lieu of dower. After certain specific bequests, he gave all the rest, residue and remainder of his property, without other description, to his two sisters and a brother. The plaintiff, after learning that her name had been omitted in the deed and that the whole property had been conveyed to her husband, received under the provisions of this will a number of payments of portions of the legacy given to her, and also kept possession of the dwelling-house devised to her, and demanded that the executor should proceed and pay off a mortgage existing thereon as a debt of the estate, and delayed for a considerable period of time to commence proceedings to reform the deed.

*Held*, that upon learning that her name had been omitted from the deed, the plaintiff was put to her election either to take under the will or to pursue her remedy by reformation of the deed, and that, in this case, she must be held to have elected to take under the will, and to have thereby lost the right to resort to the other remedy. **HAACK v. WEICKEN**..... 486

— *Right of an inmate in Soldiers and Sailor's Home, to vote.*

*See DOMICILE.*

**ELEVATED RAILROADS :**

*See RAILROADS.*

**ELMIRA** — *Charter of the city of Elmira—1875, chap. 370—over what offenses exclusive jurisdiction is conferred on the recorder.*] Under the charter of the city of Elmira (chap. 370 of 1875) the recorder has exclusive jurisdiction to try one accused of keeping a disorderly house, subject to the right of such person to apply for a certificate directing that she be prosecuted by indictment, pursuant to sections 57 and 58 of the Code of Criminal Procedure. **PEOPLE EX REL. MILLER v. COOPER**..... 106

**EMINENT DOMAIN** — *Right of the State to acquire the fee of lands to be used for a canal—of its right to authorize such lands to be used by a city as a public street—1 R. S., 225, 226, §§ 46, 52—1878, chap. 391.*] In 1838 the State of New York, acting under the authority of chapter 32 of 1833 and the general laws of the State, through its canal authorities, took possession of certain lands in Broome county for the purposes of the Chenango canal, the usual regular steps being taken to obtain the right to the land, under and by virtue of a condemnation and appraisal by the canal appraisers, as provided in sections 46 and 52 of 1 Revised Statutes, 225, 226. The appraisers, in view of the advantages and benefits likely to accrue to the residue of the property by reason of the canal facilities, allowed no money compensation for the land taken.

By chapter 391 of 1838, the right to take possession of said canal lands for the purpose of laying out a street was given to the city of Binghamton by the State, and under and by virtue of the authority conferred by the said act and a resolution of the common council, the said city thereafter entered upon and took and still retains possession of the same. Upon the trial of this action, brought by the plaintiff, who, as heir or assignee, had acquired all the rights of the persons in whom the title to those lands was vested at the time of their appropriation by the State, to recover the possession thereof;

*Held*, that the action could not be maintained.

**EMINENT DOMAIN** — *Continued.*

PAGE.

That the acts, under which the State acquired an estate in fee simple to the lands, were constitutional and valid, and that the city acquired the right to enter upon and use the same as a public street, by the act of 1878.

\*ELDRIDGE v. CITY OF BINGHAMTON ..... 202

**INDORSEMENT:**

*See* **BILLS AND NOTES.**

**EQUITY** — *Action to reach the surplus income of a trust fund — the habits and ability of the cestui que trust are to be considered in determining the amount to be allowed to him for his maintenance — the plaintiff must prove that there is a surplus.*

*See* **KILROY v. WOOD** ..... 636

— *Set-off — when allowed in equity, as against an assignee, where the debt sought to be set-off was not due at the time of the making of a general assignment by the insolvent debtor.*

*See* **ROTHSCHILD v. MACK** ..... 72

— *Action to compel an accounting by a general assignee — right of other creditors to come in after judgment and prove their claims — they cannot be compelled to contribute their share of the costs and expenses — costs and expenses of plaintiff, how paid.*

*See* **MATTER OF LEWIS v. HAKE** ..... 542

— *Summary proceedings to recover the possession of land — when the validity of a lease may be attacked in such proceedings by the defendant for fraud — when an equitable action to cancel the lease will lie.*

*See* **BECKER v. CHURCH** ..... 258

— *Lien on personal property — what agreement to give security will be enforced by courts of equity — who should be made defendants in an action to enforce it.*

*See* **WILLETS v. BROWN** ..... 140

— *Action by the receiver of a corporation to determine the validity of bonds claimed to be secured by a mortgage on its property — when it can be maintained.*

*See* **HUBBELL v. SYRACUSE IRON WORKS** ..... 182

**ESTATE:**

*See* **REAL PROPERTY.**

**LIFE ESTATE.**

**ESTOPPEL** — *A party accepting a payment under an order of the court cannot thereafter object to such order.*

*See* **FISHER v. DOUGHERTY** ..... 167

**EVIDENCE** — *Confession of a prisoner — not admitted when induced by a promise that the accused shall obtain the benefit of a State's witness.] 1. In March, 1886, the defendant was arrested in Florida by a special officer of the district attorney of Rensselaer county and an employee of the Pinkerton Detective Agency, for an offense committed in the city of Troy in February, 1884, for which he and another person were indicted in February, 1886. At Washington the party were joined by Robert A. Pinkerton, and at Albany by the district attorney. On arriving at Troy, on Sunday, March twentieth, the prisoner was taken to the office of the district attorney, where he made a confession to the district attorney in Pinkerton's presence, which was given in evidence on his trial, which occurred on March twenty-fifth. While the party was coming from Washington to the district attorney's office Pinkerton talked with the defendant about the case, the defendant saying to him several times, "What benefit am I to get out of this thing?" to which Pinkerton replied that there could be no promise made to him; that the only benefit that he could get out of the thing, as far as Pinkerton could see, was the benefit that any State's witness would get. When they were in the district attorney's office at Troy Pinkerton said to the prisoner, in the presence of the district attorney: "If you want to make a statement to the district attorney you can do it; you can use your own judgment as to whether you want to make a statement or not; the district attorney will make you no promises."*

**EVIDENCE—Continued.**

PAGE

The district attorney, who was himself sworn as a witness for the people, testified that he said, "Any statement you may make must be voluntary, and you can make one or not as you please," and also stated that he had directed the officers having charge of defendant not to allow any one to speak to him or to accompany him on the way up, and that the defendant was not taken before a magistrate until he was taken into court the next day. At Jersey City the defendant was taken out of the rear end of the train and not brought through the passenger depot, and was thereby prevented from seeing his counsel. While the evidence given upon the trial showed that the crime had been committed, there was nothing to connect the defendant with it (other than the fact of his presence in Troy at the time), except his confession.

*Held*, that the confession was not so clearly shown to have been voluntary as to render it admissible under the provision of section 895 of the Code of Criminal Procedure, excluding confessions "made upon a stipulation of the district attorney that he (the accused) shall not be prosecuted therefor."

PEOPLE v. KURTZ..... 335

2. — *When the question whether such promise was made should be submitted to the jury—Code of Criminal Procedure, § 895.*] The prisoner's counsel asked the court to charge that if the jury found that the alleged statement was made on a stipulation of the district attorney that the prisoner should not be prosecuted therefor, they must reject it. The judge refused so to charge, but did charge that they might take into consideration any evidence there might be in the case tending to show that such a stipulation was made, in determining whether the statement or confession made in the district attorney's office was or was not true.

*Held*, that although it was not necessary to decide the question in this case, the court were of the opinion that the judge erred in refusing to so charge.

That while the court must decide preliminarily the question as to whether threats or promises induced the confession, yet where this is a question of fact, depending on conflicting evidence, it should be submitted to the jury. *Id.*

3. — *Only experts can express an opinion as to genuineness of a signature—1880, chap. 86.*] Upon the trial of this action the plaintiff, who sought to prove that the signature to a certain deed was not the signature of one James Clark, produced a note which was proved to have been signed and indorsed by Clark. A witness, who was not shown to be an expert, was directed to look at the signature and indorsement of the note, and was then asked and allowed, against the defendants' objection and exception, to answer "no" to the following question: "Assuming those to be the genuine signatures of James Clark, is that the signature of James Clark on the deed I show you?"

*Held*, that the evidence should have been excluded.

McKAY v. LASHER..... 270

4. — *Witness—impeachment of, by proof of contradictory statements.*] The alleged deed of James Clark had been proved, on June 13, 1885, by the subscribing witness, one Lawrence, before a notary public, and was given in evidence with such proof by the defendants. The plaintiff was allowed, against the defendants' objection and exception, to prove statements made by Lawrence that he did not have anything to do with this transaction of Clark's; that he did not know Clark at the time, and that he was willing to assist the plaintiff if she would pay his expenses.

*Held*, that even if it could be assumed that Lawrence was to be regarded as a witness produced by the defendants, he could not be impeached, by proof of these statements, until he had first been asked whether he had ever made them.

*It seems*, that this assumption could not be made. *Id.*

5. — *When the execution and delivery of a mutual agreement is a personal transaction within the meaning of section 829 of the Code of Civil Procedure.*] This action was brought by one Cochran against the defendant, as administratrix of one Goddard, to recover damages sustained by Cochran by reason of the failure of Goddard to convey the undivided one-half of a farm to the plaintiff, as he had, by a sealed agreement made between the parties, agreed to do. The agreement was not acknowledged by either party, and there



**EVIDENCE — Continued.**

PAGE.

was no subscribing witness thereto. Upon the trial, for the purpose of proving the execution and delivery of the agreement, Cochran was called as a witness in his own behalf and stated that he was acquainted with Goddard. His counsel then placed in his hands the alleged agreement, and asked him if he executed the same, to which question he was allowed, against the objection and exception of the defendant's counsel, to answer that it was his signature,

*Held*, that it was error to allow him so to do.

That as the agreement was one, *inter partes*, which would not be binding upon either, unless executed by both with a mutual understanding that upon placing their signatures thereto it should be considered a complete agreement, binding and operating upon both parties, its execution and delivery was a mutual transaction between the parties, as to which the plaintiff was incompetent to testify. *CHAFFEE v. GODDARD*.

147

6. — *The rule excluding oral evidence, tending to vary the terms of a written agreement, does not apply to one who is a stranger to it.*] This action was brought to recover the amount due to the plaintiffs for labor and materials furnished by them, as plumbers, in erecting eighteen houses upon property belonging to the defendant. The plaintiffs commenced to work under a written agreement made between them and one Birdsall, who was to perform the work. Birdsall having died, after about one-third of the work was done, the defendant took charge of it and directed the plaintiffs to proceed with its performance.

The defendant, in his answer, stated that he assumed Birdsall's obligations and rights under the agreement, but that the quantity, style, finish, workmanship, quality and all other matters pertaining to the plumbing and gas-fitting were embodied in written specifications and plans which were submitted to and examined by the plaintiffs and formed the basis of the agreement with Birdsall. Upon the trial the defendant undertook to show the contents of these written specifications by the cross-examination of the plaintiffs, but was not permitted to do so upon the ground that as the specifications were not referred to in the written agreement, such evidence was inadmissible.

*Held*, that the referee erred in so ruling.

That as the defendant was a stranger to the agreement, the rule excluding oral evidence to add to, enlarge or restrict a written instrument did not apply. *NORTON v. KEOGH*.....

611

7. — *When the testimony of a party interested in the result is inadmissible—Code of Civil Procedure, § 829.*] This action was brought by the executors of one McDonald against the three sureties upon a lease, given by the deceased to Carpenter & Wise, to recover rent due thereon. It was defended by two of the sureties, upon the ground that the sureties had been induced to sign the lease by the false and fraudulent representations of the lessor. Upon the trial, evidence was given showing that when the lessees applied to the three sureties to become responsible for the payment of the rent, one of their number, Woolsey, requested that the lessees go to McDonald and ask for the amount taken in at the bar of the hotel in the previous year, when kept by McDonald. They went to McDonald and obtained the answer. On the trial the defendants offered, but were not allowed, to prove the communication of the same to the two defendants' sureties.

*Held*, that the evidence was properly excluded under section 829 of the Code of Civil Procedure.

That the lessees were interested in the result, as it appeared that they were in possession of the hotel, so that a judgment in favor of the sureties would leave them in possession thereof, and a judgment against the sureties would bind them.

That, being so interested in the result, they could not repeat the representations of the deceased, made to them when acting as the agents of the sureties. *HILL v. WOOLSEY*.....

483

8. — *Admissibility of the testimony of counsel as to communications had with a deceased person whose will he drew—Code of Civil Procedure, §§ 835, 836.*] Upon a hearing in a Surrogate's Court of an application for the probate of a will, which was resisted on the ground of undue influence, the counsel of

## EVIDENCE — Continued.

PAGE

the testatrix, by whom the will and codicils were prepared under her direction, and who superintended, as such counsel, their execution and publication, was called as a witness to show what transpired between the testatrix and himself, when he was called upon to prepare the will and codicils, in the process of their preparation and publication.

*Held*, that an objection to his testimony, as inadmissible under sections 835 and 836 of the Code of Civil Procedure, was properly overruled as without merit.

That if this were not so it should not defeat the probate of the will in this case because, even if the testimony of the counsel, so far as objected to, were, eliminated from the case, there would still be evidence remaining which would not justify a finding that the will and codicils were made by the decedent under what the law recognizes to be undue influence.

MATTER OF AUSTIN. .... 516

9. — *The execution of a chattel mortgage is not proved by the production of a copy thereof and of a certificate of acknowledgment attached thereto, certified by the town clerk.*] Upon the trial of this action of trover the plaintiff, who claimed title to the property under a chattel mortgage given by a former owner, put in evidence a paper, certified by the town clerk to be a copy of a paper on file in his office. The paper, the certified copy of which was received in evidence, purported to be a copy of the chattel mortgage, and of a certificate of acknowledgment as to its due execution. An objection of the defendant that the certificate of the town clerk did not prove the existence and execution of the original mortgage was overruled by the court.

*Held*, that it erred in so ruling. MAXWELL v. INMAN. .... 265

10. — *Hypothetical opinions inadmissible.*] The defendant, having testified that he signed a bond upon which this action was brought upon the representations of one Risley that he (the defendant) was on a former bond, was asked by his counsel "would you have signed the bond if these representations had not been made to you."

*Held*, that the question was properly excluded. BENEDICT v. PENFIELD. . 176

11. — *When a verdict will be set aside because of the admission of irrelevant evidence.*] Upon the trial the plaintiff, after proving that a bond or undertaking on appeal, dated September, 1882, was executed, was allowed to put the same in evidence, the objection of the defendant's counsel that it was incompetent and immaterial being overruled by the court:

*Held*, error; that as the evidence so admitted was irrelevant to the issues involved and might have prejudiced the defendant's case before the jury, and as the questions of fact upon which the decision of the case turned were sharply contested, the judgment should be reversed and a new trial granted. *Id.*

12. — *Admissibility of the confession of a defendant in an action for adultery — a decree will be granted when all just reason to believe that collusion exists is removed.*] In actions for divorce on the ground of adultery, the confessions of the defendant are always admissible in evidence, but to avoid the danger of collusion, the court, before granting the decree, will require such corroboration of the confessions as to remove all just suspicion of collusion. When that is satisfactorily done the confessions become a sufficient basis for a judgment for divorce.

In this case, in which the Special Term denied a motion for a decree of divorce, on the ground that the confessions of the defendant were not sufficiently corroborated, the General Term, after considering the evidence, reversed the order of the Special Term, holding that there was undoubted proof that the confessions were made; that they were clear and distinct; that they were sincere and not collusive, and that they were corroborated by the correspondence by letter of the guilty parties. MADGE v. MADGE. .... 524

— *Amendment to the United States Constitution requiring the accused to be confronted with the witnesses against him — not applicable to trials in State Courts for State offenses — construction of this provision in the bill of rights of the State of New York — right of the accused to testify as to a conversation with a witness who has testified as to a confession made by him — right of the accused to cross-examine a witness in order to show bias against him.*

See PEOPLE v. PENHOLLOW. .... 108

**EVIDENCE — Continued.**

PAGE.

— <i>Action to reach the surplus income of a trust fund—the habits and ability of the cestui que trust are to be considered in determining the amount to be allowed to him for his maintenance—the plaintiff must prove that there is a surplus.</i>	
<i>See KILROY v. WOOD</i> . . . . .	636
— <i>Statements of third persons—when inadmissible as evidence against a party.</i>	
<i>See FAY v. HEBBARD</i> . . . . .	490
— <i>Civil damage act—what evidence will support a verdict that a suicide resulted from intoxication.</i>	
<i>See BLATZ v. ROHRBACH</i> . . . . .	402
— <i>The recital in a sheriff's deed that an execution has been issued does not prove that fact—statute of limitations—Code of Civil Procedure, §§ 365, 368, 378—when a possession will be deemed adverse.</i>	
<i>See HASBROUCK v. BURHANS</i> . . . . .	370
— <i>When acts and declarations of a former owner of a mortgage are admitted as a part of the res gestæ to prove its payment.</i>	
<i>See HOLCOMB v. CAMPBELL</i> . . . . .	398
— <i>Parol evidence is inadmissible to explain a patent ambiguity—when a condition will be held invalid for uncertainty because of unfilled blanks therein.</i>	
<i>See VANDEVOORT v. DEWEY</i> . . . . .	68
— <i>When a reduction in the rent reserved by a lease under seal can be proved by unsealed indorsements thereon.</i>	
<i>See HART v. HAZARD</i> . . . . .	209
— <i>Damages—examination of witness as to the amount thereof—what questions are allowable.</i>	
<i>See ROGERS v. ANSON</i> . . . . .	436
— <i>Action for the conversion of personal property—the burden of proving a gift rests upon the party claiming it—when a charge that the defendant must establish the gift beyond a suspicion will be sustained.</i>	
<i>See LEWIS v. MERRITT</i> . . . . .	161
— <i>The opinion of a witness, as to who is the person alluded to in a libelous publication, is not admissible—meaning of the term "infamous crime"—a libel is not one.</i>	
<i>See PEOPLE v. PARR</i> . . . . .	313
— <i>As to personal transactions with a deceased person—to what cases the prohibition does not extend—Code of Civil Procedure, § 829.</i>	
<i>See BLAESI v. BLAESI</i> . . . . .	159
— <i>Witness—cross-examination to impeach his character—he cannot be asked upon what charge he has been arrested.</i>	
<i>See SMITH v. MULFORD</i> . . . . .	347
— <i>Of a custom, as to the manner in which other persons conduct their business, is not admissible in favor of a defendant sued for negligently conducting his business.</i>	
<i>See WRIGHT v. BOLLER</i> . . . . .	77
— <i>What proof of the publication of a will will justify the submission of the question to the jury—no formal statement is necessary.</i>	
<i>See JONES v. JONES</i> . . . . .	568
— <i>Will—what proof as to its execution by the testator will justify its admission to probate.</i>	
<i>See MATTER OF HUNT</i> . . . . .	434
— <i>Inspection of books and papers—an order compelling their production will not be granted unless it is needed to enable the party to present his own case.</i>	
<i>See SANGER v. SEYMOUR</i> . . . . .	641
— <i>Witness—what questions may be asked for the purpose of discrediting him.</i>	
<i>See YAGER v. PERSON</i> . . . . .	400
— <i>Of good character—must be considered by the jury in all cases.</i>	
<i>See PEOPLE v. CLEMENTS</i> . . . . .	358

**EXCISE COMMISSIONERS** — *Commissioners of excise in the city of New York — may be appointed by the mayor without confirmation by the board of aldermen — 1884, chap. 48.* Under the authority conferred upon the mayor of the city of New York by chapter 48 of 1884, which directs that "all appointments to office in the city of New York, now made by the mayor and confirmed by the board of aldermen, shall hereafter be made by the mayor without such confirmation," the mayor is authorized to appoint commissioners of excise, and no confirmation of such appointment by the board of aldermen is now required. *PEOPLE EX REL. HAUGHTON v. ANDREWS...* 614

**EXECUTIONS** — *Receiver in supplementary proceedings.* 1. Upon an appeal by the plaintiff from an order made at Special Term denying his motion that the court direct and require the defendant to execute and deliver to the receiver — appointed in supplementary proceedings instituted upon the judgment recovered in this action — a conveyance of his interest in lands situate in the State of Illinois, and punish him, for contempt, because of his disobedience of an order of the county judge of Ontario county directing him to make such conveyance :

*Held*, that the order should be affirmed.

That the power conferred by sections 297 and 298 of the old Code upon the judge acting in such proceedings to order any property of the judgment debtor, not exempt from execution, to be applied towards the satisfaction of the judgment, ceased upon the repeal of these sections by chapter 417 of 1877. *SMITH v. TOZER.....* 22

2. — *The title to only such real estate of the debtor as lies within this State is vested in him — Code of Civil Procedure, § 2468.* That although this court may and will exercise its equity powers at Special Term upon motions to compel conveyances to be made to receivers, in actions where the facts and circumstances are such as not to require a trial of issues in an action brought for the purpose of determining the question upon which the right to relief depends, yet it could not make the order applied for in this case, for the reason that the title to the real estate in Illinois was not vested in the receiver, as section 2468 of the Code of Civil Procedure, providing for the vesting of the property of the judgment debtor in the receiver, expressly excepts "real property," the title to which is "only" to vest in him from the time when the order, or a certified copy thereof is filed with the clerk of the county where it is situated, thereby requiring the *situs* of all real estate, to be vested in him, to be within the limits of this State. *Id.*

3. — *Judgment creditor's suit.* That the plaintiff's remedy was by a judgment creditor's action under the provisions of article 1 of title 4 of chapter 15 of the Code of Civil Procedure. *Id.*

— *Enforcement of a direction in an order requiring costs or money to be paid to any person — the remedy is by execution and not by attachment — Code Civil Procedure § 779.*

*See* *FORSTMAN v. SCHULTING.....* 648

**EXECUTORS AND ADMINISTRATORS** — *Payments made by an administrator to an infant will not be allowed.* 1. Upon an accounting of one George Hyland, as administrator of one Baxter, it appeared that Baxter died on May 27, 1862, intestate, leaving a widow, Bridget, and three infant children ; that on June 5, 1862, the said George Hyland and the widow were appointed administrators ; that Hyland took possession of the personal estate, consisting of livery property, continuing the livery business until August, 1862, when he sold the property on terms of credit, under which the last payment was not made until September, 1866. An inventory was made soon after the appointment of the administrators, but was not filed until in June, 1872; nor was any guardian appointed for the children until in May, 1872.

Upon the hearing before an auditor, appointed to examine the accounts of the administrators and report thereon, evidence was given tending to show that the widow and her family were substantially without means of support, other than such as were derived from her services and the estate of the deceased, except that a small amount was received by her from the rent of a house in her possession; that the administrator, Hyland, from time to time

**EXECUTORS AND ADMINISTRATORS — Continued.**

PAGE.

furnished her with money and articles of merchandise, which she received in her capacity as administratrix and appropriated to the support of the minor children.

*Held*, that as no general guardian had been appointed for the infant defendants, and no one was entitled to receive any portion of the fund in the hands of the administrators, the acting administrator had no legal right to hand over to his co-administrator any of the assets in his hands, or to furnish supplies for the family of the intestate at the expense of the estate.

HYLAND v. BAXTER..... 9

2. — *When an equitable claim for supplies and necessities furnished to the infant will be recognized.*] That to establish an equitable right in behalf of the administrator to an allowance or credit, as against the estate of the children, the administrator must show that he acted with good faith, and that the necessities of the minors required the expenditure of the moneys. *Id.*

3. — *The Surrogate's Court has power to allow such a claim.*] That the Surrogate's Court had jurisdiction to fully adjust and award any equities existing between the parties and in behalf of Hyland. *Id.*

4. — *Difficulty of apportionment.*] That the fact that it might be difficult to make the apportionment between the children, so as to definitely and correctly charge their respective shares with the amounts supplied, would not justify the court in refusing to make such apportionment, as the same difficulty would have existed in the accounting of the widow, if she had been the general guardian of all the children, as they were of one family. *Id.*

5. — *Severance of the family.*] A rule which requires the severance of a family for the protection of a guardian in his account, would be harsh and the consequences unnatural. *Id.*

6. — *Sales from a trustee to infant beneficiaries will not be sustained.*] The evidence showed that a considerable portion of the amount claimed by the administrator was for goods sold from his store, he being engaged in carrying on mercantile business for profit.

*Held*, that unless special reasons were shown to exist in this case those amounts should be disallowed under the rule prohibiting trustees from dealing with infant beneficiaries. *Id.*

7. — *Letters of administration — when they may be granted without issuing a citation to non-residents — Code of Civil Procedure, § 2662.*] Lydia C. Libbey, a resident of the city of Brooklyn, died there intestate, leaving a daughter, Emma, who then resided in that city, and a husband, who resided in the State of Maine. The daughter presented a petition to the surrogate praying that letters of administration upon her mother's estate might be issued to her. A few days thereafter the husband presented a similar petition asking that letters be issued to him. The surrogate granted letters to the daughter.

*Held*, that as it appeared that the husband was a non-resident the surrogate was authorized, by section 2662 of the Code of Civil Procedure, to grant the letters to the daughter on the presentation of her petition, without issuing any citation to the husband.

That he could exercise this power as well after as before the filing of the petition of the husband. LIBBEY v. MASON..... 470

8. — *Evidence of non-residence.*] That the non-residence of the husband was decisively established by the fact that he voted regularly in the State of Maine, where he owned a small place and was accustomed to pass most of his time. *Id.*

9. — *When money received by an executor under a policy of insurance on the life of the testator is not assets of his estate.*] Upon the application of the petitioner, the widow of one Van Dermoor, an order was made by a Surrogate's Court directing the executor of Van Dermoor to pay to the petitioner the money received by him, under a policy of insurance upon the life of the deceased which made the amount insured payable "to the said assured, his executors, administrators or assigns, \* \* \* for the benefit of his widow, if any."

**EXECUTORS AND ADMINISTRATORS—Continued.**

PAGE.

*Held*, that the money belonged to the widow, and was received by the defendant, not as assets of the estate of the deceased, but that he received it as a trustee under the policy for the widow.

That the order should be reversed, as the surrogate had no jurisdiction to make it. *MATTER OF VAN DERMOOR*..... 826

— *Proceedings for the sale of the real estate of a decedent to pay his debts—what allegations the petition should contain when made by a creditor—the cost of a tombstone is to be treated as a part of the funeral expenses—costs cannot be allowed by the surrogate until the proceeds of the sale have been paid to the county treasurer.*

See *MATTER OF LAIRD v. ARNOLD*..... 186

— *Reference of a disputed claim against the estate of a deceased person is a special proceeding—an appeal should be taken from the order of the Special Term confirming the referee's report and not from the judgment—the plaintiff is entitled to recover his disbursements, as a matter of right, under section 317 of the Code of Procedure, which was not repealed by chapter 417 of 1857.*

See *HATCH v. STEWART*..... 164

— *Reference to determine as to the existence of judgments or liens on funds arising from a sale in partition—when a judgment recovered against the executors of the owner will be paid therefrom—interest cannot be charged on an amount advanced from the estate to persons entitled thereto out of the share of such person with proceeds of sale.*

See *PLATT v. PLATT*..... 592

— *Surrogate—order opening a decree—how reviewed—Code of Civil Procedure, § 2481, sub. 6.*

See *PEOPLE EX REL. STEVENS v. LOTT*..... 408

— *Refusal of an executor or administrator to consent to refer a claim—when the claimant is entitled to recover costs—effect of the certificate of the judge or referee as to the refusal to refer—Code of Civil Procedure, § 1836.*

See *ELY v. TAYLOR*..... 205

— *Construction of an agreement—when the words "legal representatives" means executors and administrators, and not next of kin.*

See *GREENWOOD v. HOLBROOK*..... 633

— *An executor will be compelled to pay compound interest only in cases of gross delinquency—interest on a legacy, from what date allowable.*

See *THORN v. GARNER*..... 507

— *Assessment of personal property—when all the estate may be assessed against one of several executors.*

See *PEOPLE EX REL. NEUSTADT v. COLEMAN*..... 581

— *Reference of disputed claims against an estate—what claims may be passed by the referee—his report, when confirmed, binds the surrogate and can only be reviewed on appeal.*

See *MATTER OF GRAY*..... 411

— *Reference of a disputed claim against a decedent's estate.*

See *REFERENCE*.

**EXEMPLARY DAMAGES:**

See *DAMAGES*.

**EXEMPTION—From taxation.**

See *TAXES*.

**EXPERTS:**

See *WITNESSES*.

**EXTENSION**—*Of time of payment of a debt—by accepting as collateral an assignment of accounts not due.*

See *CONTRACT*.

**EXTRA ALLOWANCE.**

See *COSTS*.

- FALSE CERTIFICATE** — *That the stock of a corporation is paid in full.*  
*See CORPORATION.*
- FALSE PRETENSES:**  
*See CRIMES.*
- FALSE REPRESENTATIONS** — *In contracts for sale of personal property.*  
*See SALES.*
- FERRIES** — *Right of a railroad company to acquire a lease of a ferry franchise, not having either end at the railroad terminus — chap. 193 of 1884.*  
*See STABIN v. MAYOR, ETC.*..... 549
- FILING** — *In public office.*  
*See RECORDS.*
- FINE** — *For contempt.*  
*See CONTEMPT.*
- FIRM:**  
*See PARTNERSHIP.*
- FISCAL OFFICER:**  
*See MUNICIPAL CORPORATION.*
- FORECLOSURE** — *Of lien of legacy on real estate.*  
*See WILLS.*
- FORFEITURE** — *Of a policy of insurance by the non-payment of the premium — what notice must be given to the policyholder — chap. 321 of 1877.*  
*See PHELAN v. NORTHWESTERN MUTUAL LIFE INS. CO.*..... 419
- FRAUD** — *Summary proceedings to recover possession of land — when the validity of a lease may be attacked in such proceedings, by the defendant, for fraud — when an equitable action to cancel the lease will lie.*  
*See BECKER v. CHURCH.*..... 258  
 — *False certificate as to the stock of a company being paid in full — 1875, chap. 611, § 21 — over-valuation of property purchased by a company and paid for in stock.*  
*See HUNTINGTON v. ATTRILL.*..... 459
- FRAUDULENT CONVEYANCE** — *Action by a creditor to set aside a fraudulent conveyance made by a debtor — it cannot be maintained by a general creditor — proof of the non-payment of a claim, allowed by the legal representatives in another State, does not show that the plaintiff has exhausted his legal remedies — although the law of that State will not permit a suit to be brought.*  
*See NATIONAL TRADESMAN'S BANK v. WETMORE.*..... 359  
 — *General assignment by partners — when it includes individual as well as partnership property — right of the partners to pay out of their individual property partnership, in preference to individual creditors — when the right to recover property fraudulently transferred by an assignor passes to the assignee.*  
*See BECKER v. LEONARD.*..... 221  
 — *Fraudulent assignment — it must be set aside if any part thereof was made with intent to defraud.*  
*See NATIONAL BANK OF GRANVILLE v. COHN.*..... 881  
 — *Practice — the grantor must be made a party to an action to set aside a conveyance as fraudulent.*  
*See HUBBELL v. MERCHANT'S NATIONAL BANK.*..... 200  
 — *When a sale of the property of an insolvent company will be held void.*  
*See THIRD NATIONAL BANK v. ELLIOTT.*..... 121  
*See ASSIGNMENT.*
- FUNERAL EXPENSES** — *The cost of a tombstone is to be treated as part of.*  
*See MATTER OF LAIRD v. ARNOLD.*..... 186

**GAS**— *Lease of lands to be used for the purpose of boring for oil or gas — construction of covenants contained in it — when a covenant will be held void for uncertainty.*

*See* **EATON v. WILCOX**..... 61

**GENERAL ASSIGNMENT :**

*See* **ASSIGNMENT.**

**GIFT**— *Action for the conversion of personal property — the burden of proving a gift rests upon the party claiming it — when a charge that the defendant must establish the gift beyond a suspicion will be sustained.*

*See* **LEWIS v. MERRITT**..... 101

**GRANTOR AND GRANTEE:**

*See* **VENDOR AND PURCHASER.**

**DEEDS.**

**GURANTY**— *Accommodation indorser — when he cannot compel the guarantor of a note to contribute.*

*See* **PHILLIPS v. PLATO**..... 189

**GOVERNMENT GRANTS — Of land.**

*See* **LAND.**

**GRANTS**— *Of lands by the crown — construction of it — the town of East Hampton took title under the grant from the crown.*

*See* **ATKINSON v. BOWMAN**..... 404

**GUARDIAN**— *Action against sureties upon a general guardian's bond — as to whether it should be brought in the name of the infant or of the guardian.]*

1. This action was brought by the plaintiff, as general guardian of the estate of an infant, against the sureties, upon a bond given by a former guardian of the same infant, upon his appointment by the Surrogate's Court. Upon the trial the defendants objected to the maintenance of the action by the plaintiff, upon the ground that it should have been brought in the name of the infant, by the plaintiff as her guardian.

*Held*, that in view of the conflict of authority, as to the right of the plaintiff to maintain the action as general guardian of the infant, the court would hold that the suit was properly brought, but would allow the plaintiff, if he so elected, to change the title so as to make the action one by the infant, by the plaintiff as his general guardian.

The guardian, who was the principal in the bond, died on October 23, 1884, intestate, the public administrator of the city of New York being appointed to administer upon his estate. He found no assets, except six dollars and forty cents and an old desk containing a quantity of stationery and papers, and none of the assets belonging to the infant. On January 3, 1884, the guardian had filed his sworn account with the surrogate, showing \$12,137.40 to be then in his hands; and it was proved that, in September, 1884, he converted twenty-five shares of the Mercantile Trust Company stock, valued in his inventory at \$3,500, by transferring it from himself, as guardian, to himself as an individual, and thereafter selling it.

*Held*, that an objection that the action would not lie against the defendants, as sureties, without an accounting before the surrogate was properly overruled. **PERKINS v. STIMMEL**..... 520

2. — *When an action will lie against the sureties on the bond before an accounting has been had by the guardian.]* That, although an accounting is one of the conditions of the bond, for a breach of which the sureties are liable, yet it is not the only condition, the primary condition being that the guardian "will, in all things, faithfully discharge the trust reposed in him," the breach of which condition, in this case, justified the bringing of the action.

That, while the courts will require an accounting by the guardian, when that will be necessary or availing to establish the extent of the sureties' liabilities, and when it is practicable to have one, yet, where it is a proceeding of no use or advantage to the sureties, and can only result in subjecting them to the burden of a double litigation, it will not be required. *Id.*



**GUARDIAN — Continued.**

PAGE

3. — *Proceedings for the removal of a guardian — may be commenced by a petition.*] This proceeding was instituted by a petition presented by an executor of the will of E. R. B. King, deceased, to have the testamentary guardian of the infant children of the deceased removed, upon the ground that the guardian was not a competent and proper person to have the care and custody of the children.

*Held*, that an objection that the proceedings could not be lawfully commenced by petition, but that they should have been commenced by the service of a summons, was not maintainable. **MATTER OF KING..... 607**

4. — *The Supreme Court has power to remove a testamentary guardian.*] That the further objection, that the Supreme Court had no authority to remove a testamentary guardian, was equally incapable of being maintained.

That as the court had the authority to deprive a parent himself of the custody of his children, where that was proven to be necessary for their benefit, it must certainly be equally authorized to remove a guardian who derives his or her authority wholly from the parent. *Id.*

**HEALTH BOARD — Board of health — expenses incurred in abating a nuisance are to be charged upon the occupant — 1850, chapter 824, as amended by chapter 169 of 1854; chapter 790 of 1867 and chapter 761 of 1868.**] Sections 3 and 4 of chapter 824 of 1850, conferred upon boards of health power to make regulations concerning the suppression and removal of nuisances and provided that persons violating them should be deemed guilty of a misdemeanor. By chapter 790 of 1867 these sections were so amended as to confer upon the board the power to make orders in special or individual cases, and as amended they authorized the board, when its orders were not complied with to suppress a nuisance, and directed that the expense thereof should be a charge on the occupant, or any or all of the occupants, and that it might be sued for and recovered by the board and made it a lien upon the property.

Section 5 of the act of 1850, which provided that "all the expenses" incurred by the boards in the execution of the act should be a county charge, was amended by chapter 169 of 1854, so as to charge the town with so much of the said expenses as should exceed the sum of \$300. Chapter 761 of 1868 amended this section by providing that "all expenses incurred by the several boards of health, in the execution and performance of the duties imposed by this act, shall be a charge only on their respective cities, villages and towns," to be audited, levied and collected as other city, village and town charges.

*Held*, that the provisions added to section 4 by the act of 1867, charging the expense incurred in abating a nuisance upon the occupants of the property, and giving a remedy by action against them and a lien on the premises, was not repealed or affected by the passage of chapter 761 of 1868.

That the latter act must be construed to apply to such expenses only as were not covered by section 4 as amended by the act of 1867.

**PRENDERGAST v. VILLAGE SCHAGHTICOKE..... 817**

**HIGHWAYS — Laying out and opening of a highway — Commissioners of highways will not be compelled to do so, if the public will derive no benefit from it.**]

The dwelling-house and out-buildings of the relator are located about 875 feet northerly of a public highway in the town of East Fishkill, access thereto being obtained by means of a private way across the land of another private owner, and the land of a railroad company. In 1886 proceedings were instituted by the relator to procure a public highway two rods wide from his residence to the old road, and all the steps and measures required by the law were taken for that purpose and the jury certified to the necessity of the improvement, and the certificate of the jury was delivered to the commissioners of highways of the town, who forthwith filed it with the town clerk.

The relator thereupon released all claim for damages to result from the improvement, and agreed to fence the road and indemnify the town against all damages and all expenses of litigation. The highway commissioners having refused to lay out the road, the relator applied for a peremptory writ of *mandamus* commanding them to do so.

**HIGHWAYS** — *Continued.*

PAGE

*Held*, that the motion was properly denied, as it appeared that the road, if laid out and opened, would be beneficial to the relator only and not to the general public, while the burden of its construction and maintenance would be imposed upon the town.

PEOPLE EX REL. ASHLEY v. COMMISSIONERS OF HIGHWAYS.... 463

**HOMICIDE** — *Will* — the right of a devisee to take thereunder is not affected by the fact that he willfully murdered the testator.

See PRESTON v. PALMER.... 388

**HORSE RAILROAD:**

See RAILROAD.

**HUSBAND AND WIFE** — *Admissibility of the confession of a defendant in an action for adultery* — a decree will be granted when all just reason to believe that collusion exists is removed.

See MADGE v. MADGE..... 524

— *Liability of a married woman on a note* — when determined by the laws of the State where the contract is made, and not by those of the State in which payment is to be made.

See VOIGT v. BROWN..... 394

— *Action for partition* — a tenant by the curtesy of an undivided share may maintain it — Code of Civil Procedure, § 1532.

See TILTON v. VAIL..... 638

**INDICTMENT** — *Indictment for perjury* — the falsity of the facts sworn to by the accused must be averred therein — evidence of good character — must be considered by the jury in all cases.

See PEOPLE v. CLEMENTS..... 353

— *Criminal pleadings* — what must be alleged in an indictment in order to justify a conviction of grand larceny for obtaining goods under false pretenses, under section 528 of the Penal Code.

See PEOPLE v. DUMAR..... 80

See PENAL CODE.

CRIMES.

**INDORSEMENT:**

See BILLS AND NOTES.

**INFAMOUS CRIME:**

See CRIMES.

**INFANT** — *When allowed to avoid a transfer of stock belonging to her, and bearing her signature.*] 1. This action was brought to recover the amount secured to be paid by a promissory note given by the defendant Redfield, and to have sixteen shares of bank stock, alleged to have been assigned as collateral security for the note, sold, and the proceeds applied to the payment of the note. The stock did not belong to Redfield, but belonged to the defendant Baker, for whom Redfield acted as guardian. While the defendant Baker was under the age of twenty-one years, and in or about the year 1872, she, at the request of Redfield, wrote her name upon the back of the certificate, without being told for what purpose he desired her signature and without any arrangement that the shares should be transferred to him, or that he should be at liberty to sell or dispose of them. Under her name, as she had written it, her own name was again written by Redfield as her attorney.

*Held*, that as there was no intention on her part to supply Redfield with the evidence of the ownership of these shares, she was not estopped from disputing the validity of the title acquired by the plaintiff.

That even if the shares had been received by the assignor of the plaintiff, or the plaintiff himself, in reliance upon the signature of the ward, she would not be legally bound, as she was an infant at the time, and the law would, in the absence of any actual representation concerning her signature or her age, permit her to avoid its effect on the ground of her infancy.

SMITH v. BAKER..... 504

**INFANT** — *Continued.*

PAGE.

2. — *Extra allowance* — the court cannot presume bank stock to be worth more than its par value.] The shares were for the sum of twenty-five dollars each, and no evidence was given that they exceeded in value that amount. The judgment of the court below denied the right of the plaintiff to appropriate this stock to the payment of his debt, and granted an extra allowance of eighty dollars to the defendant Baker.

*Held*, that the court could not presume the shares to be worth more than their par value, and that the allowance should be reduced to twenty dollars. *Id.*

— *Payments made by an administrator to an infant will not be allowed* — when an equitable claim for supplies and necessities furnished to the infant will be recognised — the Surrogate's Court has power to allow such a claim — sales from a trustee to infant beneficiaries will not be sustained.

See *HYLAND v. BAXTER* ..... 9

— *Action against sureties upon a general guardian's bond* — as to whether it should be brought in the name of the infant or of the guardian — when an action will lie against the sureties on the bond before an accounting has been had by the guardian.

See *PERKINS v. STIMMEL* ..... 520

**INJUNCTION** — *Duty of a corporation, engaged in a public business, to serve all impartially* — when regulations established by it will be held void as unreasonable — when an injunction will be granted although damages might be recovered in an action at law.

See *SMITH v. GOLD AND STOCK TELEGRAPH CO.* ..... 454

— *Jurisdiction of the court to restrain the trustees of a religious corporation from diverting the property from the church or denomination to which the corporation is attached* — 1875, chap. 79 — 1876, chap. 176.

See *PEOPLE EX REL. PECK v. CONLEY* ..... 98

**INJURY:**

See **NEGLIGENCE.**

**INSPECTION:**

See **DISCOVERY.**

**INSURANCE** — *Mutual benefit association* — *suicide is not a violation, or an attempt to violate, a criminal law.*] 1. The decision made by this court in the case of *Darrow v. Family Fund Society* (*supra*, p. 245), holding that the suicide of a member of a corporation organized under chapter 175 of 1883, did not come within the meaning of the provision contained in the certificate, that it should be void if the assured should die "in the violation of, or attempt to violate, any criminal law," reaffirmed and followed.

See *FREEMAN v. NATIONAL BENEFIT SOCIETY* ..... 252

2. — *Duty of a corporation to make an assessment to pay death claims.*] By a certificate of insurance issued by the defendant there was to be paid to the plaintiff, "if living, \* \* \* in ninety days after due proof of the death of said member, a sum equal to the amount received from a death assessment, but not to exceed three thousand dollars;" and the fourth condition thereof provided that "the death claim under this contract shall be payable in ninety days, after satisfactory proof of the death of the said member shall have been furnished," as therein provided. The defendant objected to the right of the plaintiff to maintain the action to recover this amount upon the ground that the promise to pay was contingent, the beneficiary being restricted to a fund to be procured by an assessment, and that no proof of the existence of such fund was given.

*Held*, that these objections were properly overruled for the following reasons:

*First.* That the requirement that payment was to be made in ninety days implied that there was an obligation on the part of the company to proceed and make the necessary assessment to raise the fund.

*Second.* That as the defendant had the power to make the assessment, it could not resist the payment of the plaintiff's claim by omitting to make it.

**INSURANCE — Continued.**

PAGE

*Third.* That the furnishing of satisfactory proof of the death of the member to the society, according to the provisions of the certificate issued to him, should be held to be a demand for payment, and impliedly a demand upon the company to procure the necessary funds by an assessment, if that were necessary. *Id.*

3. — *When a report made to the insurance department is admissible in evidence against the association.*] Proof that an assessment upon the members liable to contribute to the death fund would have produced a fund sufficient to pay the plaintiff's claim, was given by the production of the report of the society made to the State Insurance Department a few days before the member's death.

*Held*, that an objection by the defendant to its reception, on the ground that it was not the best evidence of these facts, and that the books of the company should be produced, was properly overruled, as the report made, as required by law, was of equal dignity and certainty with the records of the society. *Id.*

4. — *The person receiving the amount need not have an insurable interest in the life of the member.*] It was also objected that the plaintiff could not recover, because it was not shown that she had any insurable interest in the life of Darrow.

*Held*, that it was not necessary that she should have any such interest. *Id.*

5. — *Forfeiture of a policy of insurance by the non-payment of the premium — what notice must be given to the policyholder — chap. 821 of 1877.*] Chapter 821 of 1877, after declaring that no life insurance company doing business in this State shall have power to declare forfeited or lapsed any policy thereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided, directs that whenever any premium or interest due upon a policy shall remain unpaid when due, a written or printed notice shall be addressed and mailed to the person whose life is assured, stating that unless the said premium or interest then due shall be paid within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void, "provided, however, that a notice stating when the premium will fall due, and that if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty, and not more than sixty, days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

*Held*, that when a notice was given in advance of the time when the premium would become due, the company might, in case the premium were not paid on the day it became due, declare the policy forfeited at once.

The notice served in this case by the defendant company stated the place and time at which the premium was payable, and the amount thereof, and added: "The conditions of your policy are that payment must be made on or before the day the premium is due, and members neglecting to pay are carrying their own risk. Agents have no right to waive forfeitures." Under the signature and address were printed the words, "prompt payment is necessary to keep your policy in force."

*Held*, that the notice was sufficient.

That, although it did not state in the words of the act that, unless the premium were paid, "the said policy and all payments thereon will become forfeited and void," it fairly notified the insured that, unless payment were made on the day, the policy would be forfeited.

PHELAN v. NORTH-WESTERN MUT. LIFE INS. CO. .... 419

6. — *Receiver of insolvent insurance company — duty of, as to payment of unpreferred claims.*] In proceedings instituted against the Universal Life Insurance Company, in Virginia, in 1878, the appellants, who were residents of Virginia, having procured judgment against the company upon policies issued to them, received, on December 31, 1880, a portion of the amounts due thereon under a decree of a Virginia court distributing the proceeds of securities which had been deposited in that State for the benefit of policyholders. On December 17, 1881, the company was adjudged by the courts of the State of New York to be insolvent, and a receiver was appointed, to

**INSURANCE — Continued.**

PAGE.

whom the policies owned by the appellants were presented, a dividend being claimed upon the balance remaining unpaid in the same proportion as should be paid on other demands against the company.

*Held*, that it was error for the court to charge against and reduce the dividend payable upon such claim by the amount which had been paid upon these policies under the proceedings in the State of Virginia.

PEOPLE v. UNIVERSAL LIFE INSURANCE CO. .... 616

7. — *No deduction for payments made before his appointment can be made.*] Under the statutes of this State, the receiver of an insolvent corporation is bound to apply the assets or their proceeds remaining in his hands, after the payment of debts entitled to a preference under the laws of the United States, and judgments, so far as they are liens upon the real estate of the corporation, equally among all its other creditors, as their demands existed at the time of his appointment.

No authority has been given to a receiver, or to the courts regulating his proceedings, by which one class of creditors shall be wholly or partially excluded from their proportionate part of the assets of the company, by reason of previous payments made upon their debts before the appointment of the receiver. *Id.*

8 — *Provision avoiding an insurance policy in case the assured shall die in the violation of, or the attempt to violate, any criminal law—the assured does not violate such a provision by committing suicide—Penal Code, §§ 178, 178.*] This action is brought by the plaintiff upon a policy of insurance or bond issued by the defendant, a corporation organized under chapter 175 of 1883, by which it agreed to pay to the plaintiff, the wife of one James H. Darrow, "within sixty days after the receipt of satisfactory evidence to the society of the death of the within named member, during the continuance of this bond in full force, \* \* \* five thousand dollars from the death fund of this society at the time of said death, as hereinbefore mentioned and provided." It further provided as follows: "This bond shall be void if the member named herein shall die in consequence of a duel or by the hands of justice, or in violation of, or attempt to violate, any criminal law of the United States, or of any State or country in which the member herein named may be." Upon the trial the judge excluded evidence offered by the defendant to show that Darrow committed suicide, upon the ground that that would not be a defense to the action.

*Held*, that he did not err in so doing.

Neither suicide, nor the successful attempt to commit it, is made a crime by the Penal Code of this State. DARROW v. FAMILY FUND SOCIETY. .... 245

9 — *Mutual benefit life assurance companies—1883, chap. 175—duty of such companies to resist the payment of illegal claims.*] This action was brought to recover an amount alleged to be due, under a mutual benefit life assurance certificate, to the plaintiff, as the assignee of one Stephan, to whom a certificate of membership in the defendant's association had been issued. The defendant is an association, organized under chapter 175 of 1883, for the purpose of mutual benefit life assurance. Upon the trial the defendant offered to show the invalidity of the plaintiff's claim by proving the falsity of certain representations made by Stephan upon procuring the certificate, which representations were made a part of the contract. This evidence was excluded, under the objection of the defendant, upon the ground that as the defendant had acquired the money sought to be recovered by virtue of assessments levied upon and paid by its members for the purpose of paying the claim, it thereby became the agent of its members for the purpose of paying the money upon the claim and had no right to contest its validity or withhold the payment of the money.

*Held*, that the court erred in so excluding the evidence; that it was the duty of the defendant to protect its members and the fund in its hands from all invalid claims. MATER v. EQUITABLE LIFE ASSOCIATION. .... 287

— *Change in the disposition of money to be received on the death of a member of a lodge—the transfer must be made in the form prescribed by the by-laws of the lodge.*

See IRELAND v. IRELAND ..... 213

**INSURANCE — Continued.**

PAGE.

— *When money received by an executor under a policy of insurance on the life of the testator is not assets of his estate.*

See *MATTER OF VAN DERMOORE* ..... 326

**INTEREST** — *When allowed on a legacy to a son of the testator, from the time of the latter's death.*] 1. Thomas Garner, Sr., died October 16, 1867, leaving two sons, Thomas and William T., and three daughters. By his will he gave to his "son Thomas the sum of one million dollars, to be paid him within eighteen months" after the testator's decease. His son William T. qualified and acted as his sole executor. Thomas, the son, came of age on October 9, 1859, was married on June 6, 1860, and died on March 23, 1869, leaving a widow and a daughter, who are defendants in this action. He left a will, by which he appointed his brother William T. and the plaintiff his executors; both of whom qualified. In 1871 William T., and the plaintiff, as such executors, applied to the surrogate for a final settlement of their accounts, the defendants, the widow and daughter, having notice thereof, but not appearing, except that a special guardian was appointed for the daughter. On April fourth a decree was entered, settling the executor's accounts, in which the legacy of \$1,000,000 was credited as paid at the end of eighteen months from the death of the testator, without interest.

William T. Garner having died in 1876, the plaintiff brought this action for an accounting for his proceedings subsequent to the settlement in 1871, and to obtain leave to resign and have a successor appointed. A stipulation was made in this action allowing the question as to the right to receive interest upon the \$1,000,000 from the death of the testator to be considered, notwithstanding the accounting of 1871.

*Held*, that as the evidence showed Thomas Garner, Jr., to have been in feeble health, wholly dependent upon his father for the means of support of himself, wife and child, and that his father had, from the time Thomas became of age, until the time of the father's death, regularly furnished him the money necessary for his support, it must be presumed that the testator intended that Thomas' legacy should draw interest from the time of his death. *THORN v. GARNER*..... 507

2. — *An executor will be compelled to pay compound interest only in cases of gross delinquency.*] That the plaintiff should be charged with simple interest only on the additional amount found to be due from him at the time of the former accounting, and not with compound interest. *Id.*

— *Reference to determine as to the existence of judgments or liens on funds arising from a sale in partition — interest cannot be charged on an amount advanced from the estate to persons entitled thereto out of the share of such person in the proceeds of sale.*

See *PLATT v. PLATT*..... 592

**INTERLOCUTORY JUDGMENT:**

See *JUDGMENT*

**INTOXICATING LIQUORS.** — *Commissioners of excise in the city of New York — may be appointed by the mayor without confirmation by the board of aldermen* — 1884, chap. 43.

See *PEOPLE EX REL. HAUGHTON v. ANDREWS*..... 614

— *Civil damage act — chap. 646, of 1873 — when exemplary damages may be recovered against the lessor.*

See *REID v. TERWILLIGER*..... 310

— *Civil damage act — what evidence will support a verdict that a suicide resulted from intoxication.*

See *BLATZ v. ROHRBACH*..... 402

**JOINT TENANCY** — *Recovery by one joint tenant for the use of the premises by his co-tenant.*] The court in this case found that the plaintiff had title in the premises as alleged; that the defendant had at all times refused, and does refuse to allow the plaintiff to use and enjoy his interest in the premises, or to let him into possession or to pay him any sum for use and occupation; that it received the total rental value of said premises since January, 1879, and more than its share; that it occupied the whole of said

JOINT TENANCY — *Continued.*

PAGE.

premises in such a manner that plaintiff could have no beneficial use thereof, and that no one, as they are now situated, can use them except a railroad for railroad purposes, and that it was impossible to set off a third or a half, or any fractional part thereof, and that there could be no joint occupation of them; a judgment was directed in favor of the plaintiff for an amount adjudged by the court to be the value of the plaintiff's one-third interest of the use and occupation of the said premises from January 7, 1879, to January 7, 1886.

*Held*, that the judgment should be affirmed.

MULDOWNEY *v.* MORRIS AND ESSEX R. R. Co. .... 444

**JUDGMENT** — *To what extent a judgment recovered in a former action is conclusive.*] 1. In an action, brought by the plaintiff's intestate to recover for labor performed and materials furnished, in part pursuant to a contract entered into between the intestate and the board of trustees of the village of Greenbush, dated December 20, 1870, and in part under a resolution of the said board of trustees, dated September 30, 1873, the plaintiff was allowed to recover for so much of the materials and labor as he had furnished and performed under the contract, but was not allowed to recover for what he had furnished and done under the resolution, the court holding that it was invalid for want of power in the board of trustees to pass it. Thereafter this action was brought to recover a sum claimed by him to be the liquidated damages fixed by the contract by a provision thereof which provided that "for the true and faithful performance of all and every of the covenants and agreements above mentioned, the parties to these presents bind themselves, each unto the other, in the penal sum of five thousand dollars, as fixed and settled damages, to be paid by the failing party."

*Held*, that the judgment recovered in the first action was no bar to a recovery in this one, as the causes of action were not the same, and as no fact essential to the maintenance of this action was determined adversely to the plaintiff in the former one. PARR *v.* VILLAGE OF GREENBUSH. .... 232

2. — *Effect of satisfaction of the judgment.*] That the satisfaction of the judgment in the former action upon a settlement and compromise between the parties, while an appeal was pending, did not embrace this cause of action. *Id.*

3. — *Contract signed by the board of trustees of a village — power of the board to liquidate the damages.*] That as the village had power to make the contract, it had power to fix and determine the amount of the damages to be sustained upon its breach, subject to the power of the court to correct them if alleged and shown to be so grossly excessive and fraudulent as to justify an inference of collusion being drawn therefrom. *Id.*

4. — *What provision will be construed as liquidating the damages.*] That, under the facts and circumstances of this case, the sum named in the contract was to be regarded as liquidated damages. *Id.*

5. — *Acceptance of part performance.*] By the terms of the contract the village agreed to furnish the sand and gravel and grade the street, which it could do in a certain manner prescribed by law, but not otherwise. Having failed to take the steps necessary to enable it to do this, it passed the aforesaid illegal resolution of September thirtieth requiring Parr to furnish the sand and gravel and do the grading. Upon the trial of this action the village claimed that the contract was in part performed by it, and that the intestate accepted such part performance and thereby waived his claim for damages:

*Held*, that this claim was untenable as the damages arose under that part of the contract which the village did not perform. *Id.*

— *Right of a city to recover, from one obstructing a street, a judgment it has been compelled to pay to one injured by reason of such obstruction — how far the defendant is bound by the former judgment when he was notified of the action — dedication of a street — an acceptance on the part of the city must be shown — the acceptance must be subject to all existing burdens — duty of the city to keep its streets in repair.*

See CITY OF COHOES *v.* MORRISON. .... 216

**JUDGMENT** — *Continued.*

PAGE.

— *Reference to determine as to the existence of judgments or liens on funds arising from a sale in partition — when a judgment recovered against the executors of the owner will be paid therefrom.*

See *PLATT v. PLATT*..... 592

— *When a judgment of the New York Marine Court is deemed to be a judgment of a court of record, although the court was not a court of record at the time of its entry.*

See *CAMP v. HALLAHAN*..... 626

— *Actions in tort — a several judgment may be rendered against one of several defendants.*

See *LUBRICATING OIL Co. v. STANDARD OIL Co.*..... 153

**JURISDICTION** — *Powers of courts.*

See *COURTS*.

— *Of surrogates.*

See *SURROGATE*.

**JURY** — *Confession of a prisoner — not admitted when induced by a promise that the accused shall obtain the benefit of a state's witness — when the question whether such promise was made should be submitted to the jury.*

See *PEOPLE v. KURTZ*..... 385

— *What proof of the publication of a will, will justify the submission of the question to the jury.*

See *JONES v. JONES*..... 503

— *Negligence — when a disputed question of fact should be submitted to a jury.*

See *MCCARRAGHER v. GASKELL*..... 451

— *Negligence — when the question of the plaintiff's contributory negligence should be left to the jury.*

See *LINDEMAN v. N. Y. C. H. R. R. Co.*..... 306

— *Evidence of good character — must be considered by the jury in all cases.*

See *PEOPLE v. CLEMENTS*..... 353

**JUSTICE OF THE PEACE** — *Appeal to the County Court from a justice's judgment — the right to a new trial is determined by the amount demanded in the amended complaint, and not by that asked for in the original pleadings. Code Civil Procedure, § 3063 — effect of counter claim in tort for more than fifty dollars.*

See *HINKLEY v. TROY AND ALBIA R. R. Co.*..... 281

**JUSTIFICATION** — *Of sureties on an undertaking on appeal.*

See *APPEAL*.

**KINGS COUNTY** — *Chattel mortgages — where they should be filed in Kings county — 8 R. S. (6th ed.), 143, § 11; 1 R. S. (6th ed.), 924.*

See *MARTIN v. ROTHSCHILD*..... 410

**LANDLORD AND TENANT** — *Lease of lands to be used for the purpose of boring for oil or gas — construction of covenants contained in it.] On May 19, 1881, the defendant Foster leased to the plaintiffs fifteen acres of land, with "the right to take, bore and mine for and gather all oil or gases found in and upon the premises, to have and to hold the same for the term of twelve years from this date, or as long as oil is found in paying quantities," the plaintiffs agreeing to give Foster one-eighth part of the oil produced and saved from the premises. By the lease the party of the second part (the plaintiffs) covenanted "to commence operations for said mining purposes, and prosecute the same on some portion of the above-described premises within two years from this date, or thereafter pay to the party of the first part (Foster) dollars per until work is commenced. This lease shall be null and void, and at an end unless said second party shall, within six months from this date, commence and prosecute, with due diligence, unavoidable accidents excepted, the sinking and boring of one well on or in the vicinity of this lease, to a depth of twelve hundred feet, unless oil in paying quantities is*



**LANDLORD AND TENANT — Continued.**

PAGE.

sooner found. \* \* \* If the party of the second part fails to keep and perform the covenants and agreements by him to be kept and performed, then this lease shall be null and void, and surrendered to the party of the first part."

Within six months from the date of the lease the plaintiffs drilled a well of the required depth, natural gas being found at the depth of 1,045 feet in large quantities, and some oil, but not in paying quantities, at 1,098 feet. The plaintiff used the gas or fuel in drilling the well, but not in any other manner. In the fall of 1882 the plaintiffs removed their engines, etc., leaving the casing in the well, and ceased to carry on mining operations.

In February, 1884, Foster leased the premises to the defendant, Charles P. Thurston, who subsequently assigned such lease to the defendant, The Allegany Gas Company (Limited), for the same purposes, pursuant to which they entered into possession of the same and collected and sold the gas.

In this action, brought by the plaintiffs to restrain the defendants from interfering with, or appropriating to their own use, the gas well and the gas therein, the referee held that the suspension of work upon the premises and the neglect of the plaintiffs to prosecute the same from the spring of 1882, to the time of their demand, gave Foster the right to declare the plaintiffs' rights under the lease forfeited, and that the complaint should have been dismissed.

*Held*, that he erred in so doing.

That there was no covenant in the lease which required the plaintiffs to continue the boring of oil wells upon the premises until oil was obtained in paying quantities, under a penalty of forfeiting their rights by a failure so to do.

EATON v. WILCOX..... 67

2. — *When a covenant will be held void for uncertainty.*] That the covenant requiring them to commence and prosecute operations for mining purposes within two years from the date of the lease, or thereafter pay to the party of the first part        dollars per        until work is commenced, was void for uncertainty, by reason of the blanks which were left in the vital and essential parts thereof. *Id.*

3. — *Hard and unconscionable lease.*] That the decision could not be sustained because the referee was of the impression that the lease was hard and unconscionable and that equity would not enforce the performance of it for the reason that it contained no provision for giving the lessor any part of the gas found upon the premises. *Id.*

4. — *Reformed in case of mistake.*] That if a clause, providing that the lessor should have one-eighth part of the gas, had been omitted by mistake, the contract might still be reformed so as to express the intention of the parties; that if it now expressed their intention the parties must abide by it. *Id.*

5. — *Duration of term of lease.*] The defendants claimed that the lease had expired by its own terms, as the provision that the lessees should "have and hold the same for the term of twelve years from this date, or as long as oil is found in paying quantities," limited the term to that period, during which oil was found in paying quantities.

*Held*, that this claim was not well founded; that the term fixed was for twelve years, and as much longer as oil was found in paying quantities. *Id.*

6. — *Evidence — parol evidence is inadmissible to explain a patent ambiguity.*] On February 29, 1876, Jedediah Dewey and the defendant Mary, his wife, conveyed a lot owned by the husband to their son, Albert, who, on the same day, executed a lease, which was duly recorded in the proper county clerk's office, by which, in consideration of the said conveyance, he demised and leased to the said Jedediah and Mary, "during the natural lives of them, and the survivors of them, the house and garden spot" where they then resided, being part of the premises conveyed to the son, reserving to the son "the use and occupation of the south cellar under said house; and also reserving to said party of the first part the right to terminate this lease at any time after the decease of said Jedediah Dewey, at any time when the said party of the first part has an opportunity of selling the premises, of

**LANDLORD AND TENANT** — *Continued.*

PAGE

which said house and lot or garden spot are a part, by paying to said Mary D. S. Dewey the sum of                    dollars; and also reserving to Maria E. Dewey, the sister of said party of the first part, the full and free right and privilege of a home in said house in as full and perfect manner as she now enjoys the same in said house with her father, the said Jedediah Dewey, so long as she remains unmarried."

The plaintiff, who claimed title to the premises under the foreclosure of a mortgage given on October 12, 1882, by the son, Albert, brought this action to recover the possession of the house and lot against the defendant, who, after the death of her husband, continued, and still continues, to occupy the premises.

Upon the trial the plaintiff offered to prove that at the time the lease in question was executed the clause therein relating to the payment of any money was inserted by the draughtsman without the knowledge or direction of either party to the lease; that it was so inserted for the purpose of providing for a nominal consideration only; that at the time of its execution the defendant expressly disclaimed any right under that provision to any money compensation for the surrender of her lease, and that she had, at divers times since disclaimed any rights under that provision of the lease.

*Held*, that the evidence was properly excluded.

That the failure to insert in the blank the amount that was to be paid to the defendant to terminate the lease was a patent and not a latent ambiguity, and could not be corrected by parol evidence. **VANDEVOORT v. DEWEY....**

68

7. — *When a condition will be held invalid for uncertainty because of unfilled blanks therein.*] That as the clause pertaining to the termination of the lease failed to express the condition upon which the right so to do depended, and was void for uncertainty, the demise to the defendant contained in the lease stood without any condition for terminating it until it should expire by her death. *Id.*

8. — *Tenancy from year to year — what constitutes.*] In 1851, one Paul Settle conveyed to his son, Edward, a lot of four acres, which had been leased, in 1795, by Stephen Van Rensselaer to Jacob Post for the term of sixteen years at a rent of six pounds per annum. Edward paid the arrears of rent in full up to January, 1860. On March 26, 1860, Edward conveyed the premises, by a quit-claim deed, to one Becker, "subject to the rents and covenants and conditions reserved in the original lease to Jacob Post." Becker, on March 29, 1861, conveyed a parcel of said premises by a warranty deed, not mentioning the rent or lease, to the defendant Schoonmaker, who has since been in possession thereof; no rent having been paid by him, and no demand therefor having been made upon him, before February 24, 1883, when this action was commenced to recover the possession of the premises. On July 5, 1883, Becker paid to the plaintiff, who had acquired by deed, on February 1, 1882, the interest of the Van Rensselaers, the rent in arrear upon the whole four acres, but without the knowledge or consent of the defendant Schoonmaker.

*Held*, that Becker, at the time he gave the warranty deed to Schoonmaker, was a tenant, from year to year, of the Van Rensselaers.

That as he could convey no better title than he held, he conveyed to Schoonmaker a tenancy from year to year, thereby making the possession of Schoonmaker that of the Van Rensselaers until the expiration of his tenancy.

**CHURCH v. SCHOONMAKER.....**

225

9. — *When the possession of the tenant becomes adverse — Code of Civil Procedure, § 378.*] That, by section 378 of the Code of Civil Procedure, the tenancy between the Van Rensselaers and the defendant continued for twenty years from the time of the last payment of rent, which, in this case, as regarded the defendant Schoonmaker, was made in January, 1860. *Id.*

10. — *After it has become adverse a deed conveying the landlord's interest is void for champerty.*] That at that date Schoonmaker's holding commenced to be adverse as against the Van Rensselaers, and that the deed from them to the plaintiff was void for champerty.

*Semble*, that Schoonmaker's title, though adverse to the Van Rensselaers, would not have been good as against an action of ejectment brought by them. *Id.*

**LANDLORD AND TENANT — Continued.**

PAGE.

11 — *Summary proceedings to recover possession of land — when the validity of a lease may be attacked in such proceedings, by the defendant, for fraud — when an equitable action to cancel the lease will lie.*] This action was brought by the plaintiff to have a paper executed by the parties to this action, which purported to change the relation existing between them from a tenancy from year to year to a tenancy at will, set aside on the ground that it was procured by fraud, and to restrain the defendant from further proceeding, in certain summary proceedings instituted by him, to remove the plaintiff from the possession of the demised premises. Upon the trial it appeared that on or before July 5, 1882, the plaintiff Becker was a tenant of the defendant Church; that on that day the plaintiff was induced by fraud to execute a paper purporting to change such tenancy to a tenancy at will; that in May, 1883, Church, after serving a notice to quit, pursuant to the statute to terminate a tenancy at will, instituted summary proceedings to dispossess Becker, whereupon the latter brought this action and recovered therein a judgment, from which this appeal was taken.

*Held*, that the judgment should be affirmed.

*It seems*, that the question as to whether or not the alleged lease was procured by fraud could have been tried in the summary proceedings.

BECKER v. CHURCH..... 258

— *Evidence — when a reduction in the rent reserved by a lease under seal can be proved by unsealed indorsements thereon.*

See HART v. HAZARD..... 209

— *Civil damage act — chap. 646 of 1878 — when exemplary damages may be recovered against the lessor.*

See REID v. TERWILLIGER..... 810

— *When one erecting and leasing an elevated road is liable for damages occasioned by the running of trains by the lessees of the road.*

See POND v. METROPOLITAN ELEVATED RY. CO..... 567

— *Right of one tenant in common against his co-tenant.*

See JOINT TENANCY.

**LARCENY:**

See CRIMES.

**LEASE** — *Leases of wharfs in New York city by the commissioners of the sinking fund — void if not let at public auction — 1882, chap. 410, §§ 170, 180, 716 — right of a railroad company to acquire a lease of a ferry franchise not having either end at the railroad terminus — 1884, chap. 198 — in what cases an action to restrain illegal acts will lie by a taxpayer under chap. 531 of 1881.*

See STARIN v. MAYOR, ETC..... 549

See LANDLORD AND TENANT.

**LIFE INSURANCE:**

See INSURANCE.

**LEGACY** — *Will — when residuary legatees and devisees do not become personally liable for legacies the payment of which is charged on the residuary estate — statute of limitations — when the right to foreclose a lien to secure a legacy charged on the property is not barred by it.*

See QUACKENBUSH v. QUACKENBUSH..... 829

— *Will — power of a testator to provide that a bequest shall, in case of the death of the legatee before the death of the testator, go as directed in a will then or thereafter to be executed by the legatee.*

See MATTER OF PIFFARD..... 84

— *Interest — When allowed on a legacy to a son of the testator, from the time of the latter's death — an executor will be compelled to pay compound interest only in cases of gross delinquency.*

See THORN v. GARNER..... 507

— *Will — when legacies are charged upon real estate.*

See ANDERSON v. DAVIDSON..... 481

**LEGAL REPRESENTATIVES** — *Construction of an agreement — when the words "legal representatives" means executors and administrators, and not next of kin.*

See *GREENWOOD v. HOLBROOK*..... 638

**LEGISLATURE** — *Powers of.*

See *CONSTITUTIONAL LAW.*

**LIBEL** — *The opinion of a witness, as to who is the person alluded to in a libelous publication, is not admissible — meaning of the term "infamous crime" — a libel is not one.*

See *PEOPLE v. PARR*..... 318

**LICENSES** — *Licenses for places of amusement — in Albany a discretionary power is vested in the mayor — 1883, chap. 298, tit. 8, § 14, subs. 15 and 20 — when its exercise will not be reviewed by the court.]* By subdivisions 15 and 20 of section 14 of title 8 of chapter 298 of 1883, the charter of the city of Albany confers upon its common council power "to pass general, permissive, restrictive or prohibitory ordinances \* \* \* in relation to the regulation of places of public amusement" which "shall be licensed by the mayor, under such regulations for the safety of the public attending them as the common council may by ordinance determine." Section 1 of chapter 30 of the ordinances of the common council provides that "no theatrical or musical entertainment \* \* \* place of amusement \* \* \* shall be had, maintained or kept unless license therefor is first duly obtained." \* \* \* Section 2 of the said ordinance provides that "the mayor may issue licenses for the keeping, having and performing of the entertainments above enumerated, upon payment to him" of certain sums specified in the said section, which sums the mayor is by the next section authorized, in his discretion, to reduce.

Upon an appeal from an order denying a motion made by the relator for a peremptory writ of *mandamus* requiring the mayor to grant a license for a musical entertainment, to be given by the relator at his place of business, which had been refused by the mayor upon the ground that as the relator kept a saloon where ale and spirituous liquors were sold, musical entertainments there would, in his judgment, have a demoralizing influence: *Held*, that the order should be affirmed.

That the granting or withholding of the license applied for by the relator was, under the provisions of the charter and ordinances of the city, a right and power vested in the mayor, to be exercised by him entirely in his discretion. *PEOPLE EX REL. DOOR v. THACHER*..... 349

**LIEN** — *On personal property.]* 1. The plaintiffs, who were the owners of and had the right to operate and mine for oil on certain premises and to receive as a royalty the one-eighth of the oil produced on another parcel, after entering into possession of the first-named parcel and digging five oil wells thereon, which produced a considerable quantity of oil, entered into an agreement, under seal, by which they sold and transferred all their interest in the said property, and in the machinery, apparatus and the royalty before mentioned, to the defendant Kervin, who agreed to pay therefor the sum of \$82,000. Thereafter Kervin entered into possession of the premises and operated the wells, but neglected to pay the amount due to the plaintiffs. The contract contained a provision, immediately following Kervin's promise to pay the purchase-price, that "all rigs, tanks, boilers, engines, tubing and casing now upon said land, or hereafter put upon the same, shall remain upon the same, as part and parcel of the said premises, until all payments shall be made and completed herein;" and, also, the following provision: "It is further agreed, by and between the parties hereto, that in case of failure on the part of said Kervin to make the payments herein at the time they shall, respectively, fall due for the period of ten days, then, after such failure to meet such payment, all oil produced upon the said premises shall thereafter be run into the lines to the credit of Isaac Willett (one of the plaintiffs) as a security for such payment."

*Held*, that as the vendors were owners of the fee of the lands, their interest in the wells, and all the machinery used in operating the same, must be regarded as personal property, as between the parties to this action, by force of chapter 872 of 1883. *WILLETT v. BROWN*..... 140

**LIEN — Continued.**

PAGE.

2. — *Equitable lien.*] That the plaintiffs had an equitable lien upon the property and the oil produced until the entire purchase-price was paid. *Id.*

3. — *What agreement to give security will be enforced by courts of equity.*] That, notwithstanding the omission from the agreement of any provision prescribing the form and manner in which the security was to be given, and regarding the contract as a mere executory promise to give a lien, such a promise would be regarded by courts of equity as creating an equitable lien which would be enforced, as against the party promising to give the lien and those who claimed under him, who were not innocent purchasers. *Id.*

4. — *Effect of plaintiff's possession of the premises.*] That the fact that the defendant Kervin had abandoned the premises, and that the plaintiffs had regained possession of the same and were engaged in operating the wells and receiving the product of oil and the avails thereof, did not prevent them from instituting this action to foreclose their lien, but furnished an additional reason for them to do so, as it would enable them to render an account whereby the amount of the unpaid purchase-money might be determined. *Id.*

5. — *Who should be made defendants in an action to foreclose it.*] That one to whom the defendant Kervin had made a general assignment for the benefit of his creditors, and other persons claiming some interest in the property subsequent and subordinate to the lien of the plaintiff, were properly made parties defendant. *Id.*

— *Of an attorney upon moneys collected under a judgment — when he may retain therefrom the amount due to him for services rendered in other proceedings.*

See *MATTER OF LORILLARD v. BARNARD*..... 545

— *Charge of legacies upon real estate.*

See *WILLS*.

— *Of laborers working on a railroad.*

See *RAILROAD*.

— *Upon proceeds of sale in partition.*

See *PARTITION*.

— *Upon real property.*

See *MECHANIC'S LIEN*.  
*MORTGAGES*.

**LIFE ESTATE** — *Deposit in a bank by a life-tenant of moneys received under an insurance policy on a mill — when it will be considered, as between two remaindermen in whose names the deposit was made, as personal property.*

See *JAGGER v. BIRD*..... 428

**LIGHT** — *Easement of, in a street.*

See *MUNICIPAL CORPORATION*.

**LIMITATION OF ACTIONS** — *When a judgment of the New York Marine Court is deemed to be a judgment of a court of record, although the court was not a court of record at the time of its entry.*

See *CAMP v. HALLANAN*... .. 628

— *Code of Civil Procedure, §§ 365, 368, 373 — when a possession will be deemed adverse.*

See *HARBROUCK v. BURHANS*..... 376

— *When the right to foreclose a lien to secure a legacy charged on the property is not barred by it.*

See *QUACKENBUSH v. QUACKENBUSH*..... 339

**LODGE** — *Change in the disposition of money to be received on the death of a member of a lodge — the transfer must be made in the form prescribed by the by-laws of the lodge.*

See *IRELAND v. IRELAND* ..... 212

**MANDAMUS**—*When the trustees of a religious corporation will be compelled by mandamus to open the meeting-house to a minister regularly appointed to that place.*

See *PEOPLE EX REL. PECK v. CONLEY* ..... 96

— *Surrogate—order opening decrees—how reviewed—Code of Civil Procedure, § 2481, sub. 6.*

See *PEOPLE EX REL. STEVENS v. LOTT* ..... 408

**MARINE COURT**—*Of New York.*

See *COURTS.*

**MARRIED WOMAN:**

See *HUSBAND AND WIFE.*

**MARSHAL**—*Bond of a marshal of the city of New York—a party aggrieved cannot, under an order of a justice of the Court of Common Pleas, prosecute it in the Supreme Court—1863, chap. 484.*

See *MOOG v. KEHOE* ..... 494

**MASTER AND SERVANT**—*Liability of a railroad for injuries to a passenger—when it is responsible for injuries resulting from acts done under the direction of its conductor.*

See *BELLMAN v. N. Y. C. AND H. R. R. R. Co.* ..... 130

— *Liability of a horse railroad company for the act of its driver in causing the arrest of a passenger.*

See *CORBETT v. TWENTY-THIRD STREET RY. Co.* ..... 587

**MECHANICS' LIENS**—*Does not exist until notice is filed.*] 1. On June 18, 1886, a building which the plaintiff had erected under a contract made with the defendant Curtis was accepted by the latter. On that day, at about two o'clock in the afternoon, the defendant Curtis and his wife executed a mortgage upon the premises for the sum of \$900 to a savings bank, and received from the bank that amount. The savings bank sent the mortgage by mail to the county clerk, at Poughkeepsie, who received it at seven o'clock P. M. on June nineteenth. On June twenty-first, at eight A. M., the plaintiff filed a mechanics' lien upon the same premises.

*Held*, that the lien of the mortgage was entitled to priority over that of the plaintiff. *MUNGER v. CURTIS* ..... 465

2. — *It only affects such interest as the owner then has.*] That the fact that the bank knew that the plaintiff had not been paid did not affect its right to such priority, in the absence of proof that it colluded with Curtis to defeat the claim and lien of the plaintiff. *Id.*

**MISDEMEANORS:**

See *CRIMES.*

**MORTGAGE**—*Release of premises from the lien of a mortgage—when the court will not revive the mortgage in favor of the owner of the premises, as against the widow of the mortgagor claiming dower therein.*] 1. In 1877 the plaintiff's husband died, seized in fee of certain premises upon which there was an outstanding mortgage of \$12,000, executed by the plaintiff and her husband. The premises were sold by the husband's executor, subject to the mortgage, for the consideration of one dollar. The purchaser thereafter sold to the defendant a portion of the said premises, which had been, prior to the sale, released and discharged from the said \$12,000 mortgage, the release stating that it was made "to the intent that the lands hereby conveyed may be discharged from the said mortgage."

In this action, brought by the plaintiff to recover her dower in the said premises, so sold to the defendant, the defendant claimed that although the \$12,000 mortgage had been satisfied as to the premises conveyed to him, the mortgage debt had not been paid, except to the extent of \$500; that other mortgages had been executed by the grantees of the husband's executor in substitution for so much of the original mortgage as could fairly be apportioned to this portion of the whole premises; that this was done simply for the convenience of the new purchasers of the several parcels, and that that

**MORTGAGE — Continued.**

PAGE.

portion of the \$12,000 mortgage ought, in equity, to be revived and reinstated, and that the defendant should be subrogated to the rights of the original mortgagee, and the plaintiff's claim of dower be limited to the equity of redemption.

*Held*, that regard being had to the nominal price paid for the equity of redemption; to the fact that the widow's claim for dower was not released at that sale; to the intent expressed in the written release; to the favor extended by the law to the widow's claim; to the absence of circumstances showing any mistake other than of law, the defendant had not made a case entitling him to revive and reinstate against the plaintiff a mortgage in which he never had any interest, and under which he derived no title.

EVERSON v. McMULLEN. .... 369

2. — *Filing of a chattel mortgage — 1833, chap. 279 — a subsequent agreement affecting it need not be filed — its validity is not affected by the fact that part of the agreement rests in parol.*] This action was brought by the plaintiff, who had been appointed January 15, 1834, a receiver of the property of the defendant McIntyre, in proceedings supplementary to execution, to recover the value of property of the said McIntyre, alleged to have been wrongfully and in fraud of the rights of his creditors taken by the defendants Southwick and Wells, under two bills of sale given to them respectively by McIntyre on December 29, 1833, and filed in the county clerk's office on December thirty-first (the thirtieth being Sunday). The referee found that the said bills were given by the said McIntyre at a time when he was insolvent, for money theretofore loaned to him by the defendant Southwick, and for notes indorsed for his accommodation by Wells; that, after the execution and delivery of the said bills of sale, the defendants Southwick and McIntyre signed a written agreement by which McIntyre agreed to pay over to Southwick all moneys realized upon articles sold and described in said bills of sale, to be by him applied in payment of the sums mentioned therein, and to act as the agent of Southwick and Wells in making such sales. The agreement then authorized McIntyre, "on the part of said Southwick and Wells," to sell the said articles as their agent, and not otherwise, and on condition that he pay over the proceeds as above. This agreement was not filed.

*Held*, that the fact that the second agreement was not filed did not render the bills of sale void as against the creditors of McIntyre as being a failure to comply with the provisions of section 1 of chapter 279 of 1833, providing that every mortgage or conveyance intended to operate as a mortgage which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession, shall be absolutely void as against the creditors of the mortgagor, "unless the mortgage, or a true copy thereof, shall be filed." PRESTON v. SOUTHWICK. .... 291

3. — *Chattel mortgages — where they should be filed in Kings county — 3 R. S. (6th ed.), 143, § 11; 1 R. S. (6th ed.), 921.*] Chattel mortgages upon property in the town of Flatbush, Kings county, should be filed in the office of the clerk of that town, and not in the office of the register of Kings county. MARTIN v. ROTHSCHILD. .... 410

— *Evidence — the execution of a chattel mortgage is not proved by the production of a copy thereof, and of a certificate of acknowledgment attached thereto, certified by the town clerk.*

See MAXWELL v. INMAN. .... 265

— *Evidence — when acts and declarations of a former owner of a mortgage are admitted as a part of the res gestæ to prove its payment.*

See HOLCOMB v. CAMPBELL. .... 398

— *Action by the receiver of a corporation to determine the validity of bonds claimed to be secured by a mortgage on its property — when it can be maintained.*

See HUBBELL v. SYRACUSE IRON WORKS. .... 183

**MOTION — For a new trial.**

See NEW TRIAL.

**MUNICIPAL CORPORATIONS — Right of a city to recover, from one obstructing a street, a judgment it has been compelled to pay to one injured by reason of such obstruction.**] 1. This action was brought by the city of Cohoes

MUNICIPAL CORPORATIONS — *Continued.*

PAGE.

against the defendant to recover the amount of a judgment which the city, at the suit of one Sewell, had been compelled to pay him because of an injury done to Sewell by a wrongful obstruction of a street, which obstruction was, as between the city and Sewell, the act of the city. The defendant was notified of the action brought by Sewell, and was requested, but failed, to defend it. Upon the trial of this action the judgment-roll in the action against the city was given in evidence.

*Held*, that to make that judgment conclusive evidence, as between the city and the defendant, the city was bound to prove that the defendant was the author of the act whereby Sewell was injured.

That as an inspection of the judgment-roll in that action did not show that that fact had been in issue and determined in that action, and as it was not shown by evidence *aliunde* that it was therein determined, it was necessary for the city to show by proof, outside of that judgment-roll, that the defendant was the author of the act injuring Sewell. *CITY OF COHOES v. MORRISON*. . . 216

2. — *How far the defendant is bound by the former judgment when he was notified of the action.*] In 1863 the defendant erected a tram-way over the bank of the Erie canal so as to leave a clear space of twelve feet between it and the surface of the canal bank beneath it. The canal bank belonged to the State, and the public were accustomed to travel over it, in passing from a city street, to reach a bridge built by the State across the canal. There was no evidence to show that the city had accepted this portion of the bank as a public street at the time the tram-way was erected. In 1873 the city assumed control and authority over the canal bank, graded and paved it, and in so doing raised its surface so as to reduce the twelve feet of clear space beneath the tram-way to ten feet. In 1874 Sewell, in attempting to drive a circus wagon under this tram-way, was crushed between it and the wagon, the evidence tending to show that if there had been twelve feet of clear space he would have escaped all injury.

*Held*, that as it was only needful for Sewell to show that, as between himself and the city, the city was estopped by its action from denying that the street was a public street, the defendant was not precluded by the former judgment from contesting in this case the question whether the place in question was a public street as between himself and the city. *Id.*

3. — *Dedication of a street.*] That, assuming that the State had, at the time of the erection of the tram way, dedicated this portion of the bank to the use of the public as a street, yet before it could be held that a public street had been lawfully established an acceptance on the part of the city must be proved. *Id.*

4. — *An acceptance on the part of the city must be shown.*] That there was no evidence of an acceptance until the grade was changed, and as an acceptance must be of the dedication as made, the city's acceptance, when made, was subject to the burden of the defendant's tram-way which then passed over it. *Id.*

5. — *The acceptance must be subject to all existing burdens.*] That the State could abandon its own claim, but could not without the defendant's consent, or upon compensation or by proceedings in which he might have an opportunity to be heard, extinguish his, and that the city occupied no better position than the State. *Id.*

6. — *Duty of the city to keep its streets in repair.*] The city contended that the judgment in the former action was conclusive that it did not accept the street, subject to the obstruction, because if it had Sewell could not have recovered, as he was one of the public which had accepted the dedication and thus accepted its burden.

*Held*, that the answer to this was that the city was bound to keep its public streets in a reasonably safe condition for travel, and should not invite the public to use them before it had placed them in that condition. *Id.*

7. — *Easement of light from a street — right of an abutting owner to recover damages for an interference with it.*] This action was brought to recover damages for injuries occasioned to a four-story brick building belonging to the plaintiff, situated on the corner of McDougal and West Third street, in the city of New York, by the construction of an elevated road in



**MUNICIPAL CORPORATIONS — Continued.**

PAGE.

West Third street by the defendant, the Metropolitan Elevated Railway Company, and by the operation of the same by the defendant, the Manhattan Railway Company, to whom it was leased in 1879.

*Held*, that although the plaintiff did not own the fee of the street he had an easement of light therefrom, which entitled him to maintain an action to recover the damages occasioned by any interference with, or interruption of the passage of the light from the street to his property.

POND v. METROPOLITAN ELEVATED RY. Co. .... 567

8. — *Running of trains.*] That in determining the amount of the damages the operation of the road as an entirety must be considered, and that as the running of the trains constitutes an essential part of the operation of the road any interruption of light thereby occasioned was to be considered as arising from the structure and its uses, and as forming a part of the disturbing cause. *Id.*

9. — *When one erecting and leasing an elevated road is liable for damages occasioned by the running of trains by the lessee of the road.*] That the fact that the defendant, the Metropolitan Railway, did not, after May 20, 1879, use the structure which it had leased to the defendant, the Manhattan Railway Company, did not prevent a judgment from being given against both defendants, as the first company, erecting the structure, by leasing it, when equipped for use, to the other defendant, continued the wrong complained of. *Id.*

— *When the treasurer of a village is its chief fiscal officer within the meaning of section 3245 of the Code of Civil Procedure.*] Under the provisions of the charter of the village of Cortland (1864, chap. 406 the treasurer of the village, and not the common council thereof, is "the chief fiscal officer of the corporation" within the meaning of these words as used in section 3245 of the Code of Civil Procedure, which prohibits the allowance of costs to the plaintiff, in actions against municipal corporations, unless the claim upon which it is founded was, before the commencement of the action, presented to that officer. FISHER v. VILLAGE OF CORTLAND. .... 173

— *Leases of wharfs in New York by the commissioners of the sinking fund — void if not let at public auction — right of a railroad company to acquire a lease of a ferry franchise not having either end at the railroad terminus — in what cases an action to restrain illegal acts will lie by a taxpayer under chapter 531 of 1881.*

See STARIN v. MAYOR, ETC. .... 549

— *Contract signed by the board of trustees of a village — power of the board to liquidate the damages — what provision will be construed as liquidating the damages and not as fixing a penalty.*

See PARR v. VILLAGE OF GREENBUSH. .... 232

— *Eminent domain — right of the state to acquire the fee in lands to be used for a canal — of its right to authorize such lands to be used by a city as a public street — 1 R. 8, 225, 2. 6, §§ 46, 52 — 1878, chap. 391.*

See ELDRIDGE v. CITY OF BINGHAMTON. .... 202

— *Licenses for places of amusement — in Albany a discretionary power is vested in the mayor — 1888 chap. 298 tit. 8 § 14, sub. 15 and 20 — when its exercise will not be reviewed by the court.*

See PEOPLE EX REL. DOERF v. THACHER. .... 349

— *When an underground railroad is a street railroad within section 18 of article 3 of the Constitution — chapter 582 of 1880 is unconstitutional as violating this section.*

See MATTER OF N. Y. DISTRICT RAILWAY CO. .... 621

— *Commissioners of excise in the city of New York — may be appointed by the mayor without confirmation by the board of aldermen — 1884, chap. 48.*

See PEOPLE EX REL. HAUGHTON v. ANDREWS. .... 614

— *Dismissal of members of the police force of Brooklyn — 1873, chap. 863, § 14, tit. 11, as amended by chap. 457 of 1881.*

See PEOPLE EX REL. HAYES v. CARROLL. .... 438

— *Charter of the city of Elmira — 1875, chap. 370 — over what offenses exclusive jurisdiction is conferred on the recorder.*

See PEOPLE EX REL. MILLER v. COOPER. .... 196

**MURDER :***See* HOMICIDE.**MUTUAL BENEFIT ASSOCIATIONS :***See* ASSOCIATIONS.**NAVIGATION :***See* SHIPPING.**NECESSARIES :***See* INFANTS.

PAGE.

**NEGLIGENCE** — *When the question of the plaintiff's contributory negligence should be left to the jury — right of one finding the gates at a railroad crossing open, to assume that it is safe to cross* } Upon the trial of this action, brought by the plaintiff to recover damages for the negligent killing of her husband by the defendant, it appeared that on the night of June eighth, at about nine o'clock, when it was "pretty dark," the deceased, a charcoal peddler, in returning home with a team of horses and his empty wagon, reached a place where the highway crossed the defendant's three tracks on grade. On the west side of the tracks, from which side the deceased approached, were gates consisting of two white poles (worked by a crank on the north side of the highway west of the tracks), which were usually lowered when trains were coming, making it impossible to cross the tracks. As the deceased crossed the track he was struck by an engine backing slowly southward, without any light and without ringing any bell or blowing a whistle, and was killed. The gates were up.

Evidence was given tending to show that the deceased, just before reaching the track, was standing in his wagon leaning on the forward part and looking up and down to see if there was any train approaching. and other evidence was given tending to show that the defendant's flagman, who was on the easterly side of the tracks south of the highway, hallooed to the deceased, "stay back."

*Held*, that it was error to nonsuit the plaintiff; that, taking all the circumstances into account, especially the open gates, the slowness of the engine's backward motion, the absence of light upon it, the noise which the wagon would naturally make, the question of the negligence of the deceased should have been left to the jury. **LINDEMAN v. N. Y. C. AND H. R. R. Co.** . . . . . 306

— *Right of a city to recover, from one obstructing a street, a judgment it has been compelled to pay to one injured by reason of such obstruction.*

*See* **CITY OF COHUES v. MORRISON** . . . . . 216

— *Evidence of a custom, as to the manner in which other persons conduct their business, is not admissible in favor of a defendant sued for negligently conducting his business.*

*See* **WRIGHT v. BOLLER** . . . . . 77

— *Liability of a railroad for injuries to a passenger — when it is responsible for injuries resulting from acts done under the direction of its conductor.*

*See* **BELLMAN v. N. Y. C. AND H. R. R. Co.** . . . . . 130

— *Liability of all the members of a firm for the negligence of one of them — when a disputed question of fact should be submitted to the jury.*

*See* **McCARRAGHER v. GASKELL** . . . . . 451

**NEGOTIABLE PAPER:***See* **BILLS AND NOTES.****NEWLY DISCOVERED EVIDENCE** — *New trial because of.**See* **NEW TRIAL.**

**NEW TRIAL** — *A motion for a new trial on the minutes of the justice can only be made when a verdict has been rendered — Code of Civil Procedure, § 993* }

1. Upon the trial of this action, brought to recover moneys alleged to have been deposited by the plaintiff's assignor with the defendant, a private banker, the plaintiff was nonsuited by the court, upon the ground that it had failed to show a title to the moneys deposited; a motion was thereupon made by the plaintiff for a new trial upon the minutes of the justice trying the

**NEW TRIAL**—*Continued.*

PAGE.

case, which was entertained and denied. From this order an appeal was taken by the plaintiff, which is still pending. Subsequently the plaintiff moved, at a Special Term held by the trial judge, for an order vacating the previous orders of the court entertaining and denying the motion for a new trial. From an order granting this motion the defendant appealed.

*Held*, that the trial judge had no authority to entertain the motion for a new trial made upon his minutes, as such a motion can only be made in those cases in which a verdict has been rendered. **FIRST NAT. BANK v. CLARK...** 90

2. — *Power of a Special Term to entertain a motion to vacate an order erroneously granted.*] That as the order denying the motion for the new trial was erroneous and invalid, it was proper for the Special Term to hear and grant the motion made by the plaintiff to have the said order vacated. *Id.*

3. — *Motion not barred by an appeal.*] That the plaintiff was not barred from making the motion, because it had taken an appeal from the order denying a new trial.

No opinion was expressed by the court upon the question as to whether the plaintiff could move upon the case as settled for a new trial without first formally discontinuing his appeal, nor as to whether the defendant should be allowed any cost on such appeal. *Id.*

— *Appeal to the County Court from a justice's judgment — the right to a new trial is determined by the amount demanded in the amended, and not by that asked for in the original pleadings — Code of Civil Procedure, § 3068 — what counter-claim cannot be pleaded in an action of tort — when an amount exceeding fifty dollars claimed thereby will not justify a new trial on appeal.*

*See HINKLEY v. TROY AND ALBIA R. R. Co.*..... 281

— *Order granting a new trial, after a conviction of a crime, upon the ground of newly discovered evidence — the people cannot appeal therefrom.*

*See PEOPLE v. BECKWITH.*..... 326

**NEW YORK CITY** — *Leases of wharfs in New York by the commissioners of the sinking fund — void if not let at public auction — 1882, chap. 410, §§ 170, 180, 716.]* 1. Upon the trial of this action, brought by the plaintiff as a taxpayer under chapter 581 of 1881, against the defendants, the commissioners of the sinking fund, to set aside a lease of ferry franchises and a wharf, it appeared that the wharf was situated at the foot of Whitehall street, and that one of the ferry routes extended from that street to Staten Island and the other from the same point to Bay Ridge, Long Island. The franchises, after having been advertised in the notice of sale, to be let for the term of eight years and eleven months from June 1, 1884, were sold to the defendant, the Staten Island Rapid Transit Railroad Company. The notice of the sale fixed the rental of the wharf at the sum of \$10,000, and stated that the ferry franchises were to be offered at an upset price of five per cent of their gross receipts. The sale was made as provided in the notice, against the objections that each ferry route should be separately sold, and that the rental for the wharf property should be fixed by the price for which the purchaser would be willing to take it at an auction sale.

*Held*, that the authority conferred by section 180 of chapter 410 of 1882 upon the commissioners of the sinking fund to lease the wharf along with the franchise of a ferry, was qualified by the direction contained in section 716 of the same act, that "all leases, other than for districts appropriated by said department to special commercial interests, shall be made at public auction to the highest bidder."

That as the commissioners had disposed of the lease-hold term of the wharf at the fixed rental of \$10,000, in violation of the provisions of this act, their proceedings were illegal; and should, in so far as they had been consummated, be vacated and set aside. **STARIN v. MAYOR, ETC.**..... 549

2. — *In what cases an action to restrain illegal acts will lie by a taxpayer under chap. 581 of 1881.*] That as the plaintiff possessed the qualifications prescribed in the act of 1881, and had given the bond required by it, he was entitled to maintain this action, and that the fact that he was a bidder at the sale, and was interested in the use of the wharf and the ferry franchises previous to the time at which the sale was had, did not disqualify him from so doing. *Id.*

**NEW YORK CITY — Continued.**

PAGE.

8. — *Right of a railroad company to acquire a lease of a ferry franchise not having either end at the railroad terminus*—1894, chap. 193.] The defendant railroad company was incorporated, under the general laws of this State, to construct and operate a railway from a point on the shore of the lower bay of New York, at or near New Dorp Lane, to or near the foot of the church road in the village of Port Richmond.

Chapter 193 of 1894 authorizes any steam railroad company incorporated under the laws of this State, with a terminus in the harbor of New York, to purchase or lease boats propelled by steam, or otherwise, and operate the same as a ferry, or otherwise, over the waters of the harbor of New York, to any point distant, not more than ten miles from said terminus.

*Held*, that while the act was sufficiently broad to entitle the company to acquire the necessary boats and franchise and to operate a ferry from the terminus of its road to the city of New York, it does not appear to confer upon the company the power to lease another distinct ferry, as it proposed to do, to be operated from the city of New York to Bay Ridge on Long Island.

That as the sale was made, so far as the wharf was included in it, for a distinct price, incapable of being separated, it must, even if authorized in part, be wholly set aside. *Id.*

— *Assessment for personal property*—when all the estate may be assessed against one of several executors—power of the commissioners of taxes in New York city to correct erroneous assessments—1882, chap. 410, § 820—power of the court to do so on the hearing of a certiorari to review them—Code of Civil Procedure, § 2141.

See *PEOPLE EX REL. NEUSTADT v. COLEMAN*..... 581

— *Bond of a marshall of the city of New York*—a party aggrieved cannot, under an order of a justice of the Court of Common Pleas, prosecute it in the Supreme Court—1882, chap. 484.

See *MOOG v. KEHOR*..... 494

— *Commissioners of excise in the city of New York*—may be appointed by the mayor, without confirmation by the board of aldermen—1884, chap. 43.

See *PEOPLE EX REL. HAUGHTON v. ANDREWS*..... 614

**NEW YORK MARINE COURT:**

See *COURTS*.

**NEXT OF KIN**—*Construction of an agreement*—when the words "legal representatives" means executors and administrators, and not next of kin.

See *GREENWOOD v. HOLBROOK*..... 638

**NON-RESIDENT**—*Exemption of money of, from tax.*

See *TAXES*.

**NOTICE**—*Forfeiture of a policy of insurance by the non-payment of the premium*—what notice must be given to the policyholder—chap. 821 of 1877.

See *PHELAN v. NORTH-WESTERN MUT. LIFE INS. CO.*..... 419

**NUISANCE**—*Board of Health*—expenses incurred in abating a nuisance are to be charged upon the occupant—1850, chap. 824 as amended by chap. 167 of 1854; chap. 760 of 1867 and chap. 761 of 1868.

See *PRENDERGAST v. VILLAGE OF SCHAGHTICOKE*..... 317

**OFFICERS**—*Constitution*—the legislature cannot provide for the election of a justice of the peace for a village—Constitution, art. 6, § 18—there can be no de facto officer unless there be an actual existing office.

See *PEOPLE EX REL. SINKLER v. TERRY*..... 278

— *Defects in a constable's bond*—1 R. S. 346, § 21, as amended by chap. 788 of 1872—until removed the constable's acts are to be treated as those of an officer de jure as to third persons.

See *ADAMS v. TATOR*..... 884

— *Of a corporation.*

See *CORPORATION*.

— *Of a bank.*

See *BANKING*.

**OIL** — *Lease of lands to be used for the purpose of boring for oil or gas — construction of covenants contained in it — when a covenant will be held void for uncertainty.*

See *EATON v. WILCOX*..... 61

**OPINIONS** — *Of witnesses — when admissible as evidence.*

See *WITNESSES*.

**ORAL EVIDENCE:**

See *EVIDENCE*.

**PAROL EVIDENCE:**

See *EVIDENCE*.

**PARTIES** — *Practice — the grantor must be made a party to an action to set aside a conveyance as fraudulent.*] This action was brought by the plaintiff, who had been appointed a receiver of the Syracuse Iron Works in a creditors' action, brought under section 1784 of the Code of Civil Procedure, to set aside as fraudulent a judgment in favor of the defendant, entered upon an offer made by the Syracuse Iron Company, in an action brought against it by the defendant, and to recover the value of the chattels sold under an execution issued on the said judgment.

*Held*, that a demurrer, interposed upon the ground that there was a defect of parties defendant, because of the non-joinder of the Syracuse Iron Works, should be sustained.

The rule is settled that in actions to set aside fraudulent conveyances, the alleged fraudulent grantor is a necessary party defendant.

*HUBBELL v. MERCHANTS NAT. BANK*..... 200

— *Action against sureties upon a general guardian's bond — as to whether it should be brought in the name of the infant or of the guardian — when an action will lie against the sureties on the bond before an accounting has been had by the guardian.*

See *PERKINS v. STIMMEL*..... 520

— *Bond — right of one not a party to it to enforce an agreement by the obligor to pay a debt due to the claimant from the obligee's ancestor.*

See *PULVER v. SKINNER*..... 322

— *Lien on personal property — what agreement to give security will be enforced by courts of equity — who should be made defendants in an action to foreclose it.*

See *WILLETTS v. BROWN*..... 140

— *Action for partition — a tenant by the curtesy of an undivided share may maintain it — Code of Civil Procedure, § 1532.*

See *TILTON v. VAIL*..... 638

**PARTITION** — *Reference to determine as to the existence of judgments or liens on funds arising from a sale in partition.*] 1. After an order had been made appointing a referee, to take proof and report the respective amounts which the defendants were entitled to receive of the proceeds arising from sales in three actions of partition, a motion was made for an order directing the referee to take proof of any liens that might be presented to him.

It was stated, in the moving affidavit, that there were liens which it was desirable and advantageous to have proved and brought before the court, but no lien was particularized or described, nor were any facts disclosed indicating the existence of any claim whatever of such a description in favor of any person, or which should justly be included in the hearing before the referee in order to enable him to determine the rights of the parties to the proceeds of the property.

*Held*, that the motion was properly denied on account of the defective condition of the moving papers. *PLATT v. PLATT*..... 592

2. — *When a judgment recovered against the executors of the owner will be paid therefrom.*] Upon the application of one who had recovered a judgment, against the executors of the deceased owner of the land partitioned, upon a debt due from the deceased, and against a receiver of the estate

**PARTITION** — *Continued.*

PAGE

appointed on the removal of the executors, the referee was empowered to inquire into the existence of such judgment.

*Held*, that the court had power to direct this to be done.

Upon the hearing it appeared that the judgment had been recovered by one De Grauw, against the executors of Nathan C. Platt, the owner of the real estate partitioned, upon an indebtedness owing by the testator in his lifetime, and that upon this judgment another judgment was recovered against a receiver of the estate appointed after the removal of the executors.

*Held*, that as it appeared that there was no personal estate out of which the judgment could be paid, and that it was recovered upon a debt owing by the testator himself, it was equitably a lien upon his real estate, and upon the fund before the court, and that the creditor had the right to apply for the payment of the judgment out of the proceeds of this property, even though the judgment itself might not, under the statutes of this State, have become a lien upon the testator's real estate. *Id.*

3. — *Interest cannot be charged on an amount advanced from the estate to persons entitled thereto out of the share of such person in the proceeds of sale* ] In determining the respective shares which each of the parties was entitled to receive, the amounts which certain of the parties in interest had received from the estate, previous to the time of the reference, were added by the referee to the aggregate of the funds arising from the sales of the real estate in the three different actions of partition, and charged against the shares of the persons who received the same, with interest thereon from the time of its receipt down to the time of the date of his report.

*Held*, that he erred in charging interest upon the amounts received, as there was no legal grounds upon which it could be computed or charged. *Id.*

4. — *Action for — a tenant by the curtesy of an undivided share may maintain it — Code of Civil Procedure, § 1532.* ] In January, 1871, one Vail died, seized of certain real estate, leaving him surviving his widow, a son and two daughters. In December, 1881, one of the daughters intermarried with the plaintiff. On June 30, 1884, she gave birth to a male child, who lived only for a day, and on July eighth she died intestate, leaving her mother sister, brother and the plaintiff her surviving.

*Held*, that the real estate was held by the plaintiff and the widow and surviving children of Vail as tenants in common, and that the plaintiff was entitled to maintain an action for the partition of the property under the provisions of section 1532 of the Code of Civil Procedure.

TILTON v. VAIL..... 688

**PARTNERSHIP** — *Liability of all the members of a firm for the negligence of one of them — when a disputed question of fact should be submitted to the jury* ] This action was brought by the plaintiff, a journeyman blacksmith, against the defendants, his employers, who were boss blacksmiths, to recover damages alleged to have been occasioned by reason of their negligence. While he was engaged in welding a foot upon a stanchion, both being made of iron, the defendant Greenlie, standing to the plaintiff's left and rear, suddenly and without warning threw what is called "cherry welding compound," a mixture of borax and iron filings, upon the surface of the iron, whereby a sputtering-flux was formed and one of the liquid particles flew into the plaintiff's eye, so injuring it that he has lost the sight of it. Upon the trial the evidence was conflicting as to whether or not suddenly throwing this compound upon hot iron without warning was unusual and calculated to produce such an injury.

*Held*, that the question was properly submitted to the jury, as the evidence was such that reasonable men might well differ as to the inferences to be drawn from it.

That a verdict in favor of the plaintiff would not be disturbed.

That an exception to the ruling that the copartners of Greenlie could be held liable for his negligent or careless act was not well taken.

MCCARRAGHER v. GASKELL..... 451

— *Right of one partner to transfer firm property, in consideration of an agreement by the purchaser to pay a certain percentage upon the firm debts —*

**PARTNERSHIP** — *Continued.*

PAGE.

*when it will be sustained as against objecting creditors—a condition that the amount to be paid shall be received in full of the debt would invalidate it.*

See CHADWICK v. BURROWS..... 29

— *General assignment by partners—when it includes individual as well as partnership property—right of the partners to pay out of their individual property partnership, in preference to individual creditors—when the right to recover property fraudulently transferred by an assignor passes to the assignee.*

See BECKER v. LEONARD..... 221

— *General assignment—firm creditors may be preferred to individual creditors—the surviving partner may make a general assignment—debts contracted by a surviving partner are his individual debts.*

See HAYNES v. BROOKS..... 538

**PASSENGER :**

See RAILROADS.

**PAYMENT** — *Evidence—when acts and declarations of a former owner of a mortgage are admitted as a part of the res gestæ to prove its payment.*

See HOLCOMB v. CAMPBELL..... 398

**PENAL CODE** — §§ 173-178—*Provision avoiding an insurance policy in case the assured shall die in the violation of, or the attempt to violate, any criminal law—the assured does not violate such a provision by committing suicide.*

See DARROW v. FAMILY FUND SOCIETY..... 345

— § 383 — *Civil rights—an owner of a skating rink refusing to sell tickets to a colored person, is guilty of a misdemeanor.*

See PEOPLE v. KING..... 183

— § 528 — *Criminal pleadings—what must be alleged in an indictment in order to justify a conviction of grand larceny, for obtaining goods under false pretenses under this section.*

See PEOPLE v. DUMAR..... 80

— § 600 — *Overdrawing of his accounts by a bank officer—what must be shown to justify his conviction under this section.*

See PEOPLE v. CLEMENTS..... 283

[See table of sections of the Penal Code cited, *ante*, in this volume.]

**PERJURY** — *Indictment for—the falsity of the facts sworn to by the accused must be averred therein.*

See PEOPLE v. CLEMENTS..... 853

**PERSONAL PROPERTY** — *Deposit in a bank by a life tenant, of moneys received under an insurance policy on a mill—when it will be considered, as between two remaindermen in whose names the deposit was made, as personal property.] The plaintiff and his sister, the defendant's testatrix, owned an undivided one-half of a certain mill property, subject to the life estate in such undivided half of their father, who was, in 1849, the time when the mill was destroyed by fire, over eighty years of age. One-half of the amount received under the policy of insurance, which had been issued to the father and one Luce the owners of the mill property, was, with the consent of the father, deposited in a savings bank to the credit of the plaintiff and his sister, subject to draft by both. The mill was not rebuilt.*

In March, 1883, the sister died, having made a will in 1870 by which she left her interest in the mill property to the plaintiff, her brother, and in May, 1884, the father died, making the plaintiff his executor, and leaving to him all the residue of his estate. Thereafter the plaintiff brought this action, claiming to be entitled to the whole amount of the deposit in the savings bank, as the devisee of his sister, if the fund was to be treated as realty, and as the executor of, and a legatee under, the will of his father, if it were to be treated as personalty.

*Held*, that the claim was untenable.

That the fund was to be regarded as personal property which was owned by the brother and sister jointly. JAGGER v. BIRD..... 438

**PERSONAL PROPERTY — Continued.**

PAGE.

— *Action for the conversion of personal property — the burden of proving a gift rests upon the party claiming it — when a charge that the defendant muts establish the gift beyond a suspicion will be sustained.*

See *LEWIS v. MERRITT*..... 161

— *Lien on personal property — what agreement to give security will be enforced by courts of equity — who should be made defendants in an action to foreclose it.*

See *WILLETTS v. BROWN*..... 140

— *Sale of.*

See *SALES*.

**PERSONAL TRANSACTION — Evidence — when the execution and delivery of a mutual agreement is a personal transaction within the meaning of section 829 of the Code of Civil Procedure.**

See *CHAFFEE v. GODDARD*..... 147

— *Evidence as to personal transactions with a deceased person — to what cases the prohibition does not extend — Code of Civil Procedure, § 829.*

See *BLAESI v. BLAESI*..... 159

**PLACE OF TRIAL:**

See *VENUE*.

**PLEADINGS —** *What facts should be alleged in the complaint in an action by a school teacher against the trustees of the district.*] 1. In this action, brought to recover wages alleged to be due to the plaintiff, as a teacher in the school district of which the defendant was the trustee, the complaint alleged that the plaintiff was employed by the defendant to, and did, teach the school in said district for the period of three months, and that the wages due to him therefor amounted to the sum of \$120, no part of which had been paid, and that the defendant had neglected and refused to pay the same. Upon an appeal from an order overruling a demurrer interposed to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action:

*Held*, that it must be assumed that the plaintiff was a qualified teacher, and that his services were solicited and contracted for, by and in behalf of the defendant, by a person authorized and empowered by law; that if the plaintiff was not qualified, the disqualifying facts should be alleged in the answer.

It was claimed that the complaint was defective because there was no averment, in terms, of a refusal to give an order on the supervisor for public moneys, or of a refusal or neglect to collect any balance by tax.

*Held*, that the allegation that the defendant had "neglected and refused to pay" the wages was equivalent to such an averment.

That the plaintiff was not required to aver specifically that he had performed each act and duty required to be done and performed by him in the discharge of his duties as a teacher in the public schools, and that any failure on his part so to do should be set up in the answer as a defense.

*ELLIS v. SHARP*..... 179

2. — *Right of the plaintiff to any relief he may be entitled to upon the case made — when one tenant in common may recover, for use and occupation, from a co-tenant who excludes him from the possession of the premises.*] The plaintiff alleged in his complaint that, in 1857, John Dunn, of Morris county, New Jersey, died intestate, leaving him surviving his widow, Margaret, and two children, John J. and May, and being then seized in fee of a parcel of land situate at Madison, in New Jersey, which is described in the complaint. In 1873, May Dunn, the daughter, was married to the plaintiff, of which marriage a child was born in December, 1875, which died in July, 1876. The daughter died intestate in September, 1876. In 1878, Margaret, the widow of John Dunn, and her son, John J., conveyed the said premises to F. S. Lathrop, who, in January, 1879, conveyed them to the defendant, which has ever since been in the quiet and undisputed possession thereof; that the said premises, when conveyed to the defendant, were wholly vacant and unimproved, but were, at the time this action was brought, covered by a



**PLEADINGS** — *Continued.*

PAGE.

depot building erected and occupied by the defendant for the purposes of its business; that the plaintiff did not, prior to the summer of 1884, know that he had any interest in the premises. The relief demanded was that the defendant should account to the plaintiff for the rents, issues and profits of the premises and pay to the plaintiff the rental value of his interest in the premises from the date of the conveyance by Lathrop in January, 1879.

*Held*, that an objection made by the defendant that, as the defendant itself occupied the premises, it could not be required, under the facts stated in the complaint, to respond in rent or to render an account was properly overruled, as it was competent for the court to permit the plaintiff to take any judgment consistent with the case made by the complaint and embraced within the issue. **MULDOWNEY v. MORRIS AND ESSEX R. R. Co.** ..... 444

— *What allegations establish a cause of action for conversion.*] A complaint alleging, in substance—that on the 17th day of March, 1886, the plaintiff, as tenant in common with the defendant, was in the possession of a quantity of hay, and that the defendant, claiming to be the absolute owner thereof, then wholly converted the same to his own use, to the plaintiff's damage—states facts constituting a cause of action, and requires that a demurrer interposed thereto, upon the ground of its failure to state facts constituting a cause of action, be overruled. **THAYER v. GUILLE**..... 268

— *Criminal pleadings—what must be alleged in an indictment in order to justify a conviction of grand larceny, for obtaining goods under false pretense, under section 528 of the Penal Code.*

See **PEOPLE v. DUMAR**..... 80

— *Liability of a corporation for slandering the business of another corporation carrying on the same business—a pleading should allege that the acts complained of were done by the corporation and not by its agent.*

See **LUBRICATING OIL Co. v. STANDARD OIL Co.**..... 153

— *What counter-claim cannot be pleaded in an action of tort.*

See **HINKLEY v. TROY AND ALBIA R. R. Co**..... 281

**POLICE** — *Dismissal of members of the police force of Brooklyn—1873, chap. 868, § 14, title 11, as amended by chap. 457 of 1881.*

See **PEOPLE EX REL. HAYES v. CARROLL**..... 428

**POSSESSION** — *Statute of Limitations—Code of Civil Procedure, §§ 865, 868, 878—when a possession will be deemed adverse.*

See **HASBROUCK v. BURHANS**..... 376

**POWERS** — *Will—power of a testator to provide that a bequest shall, in case of the death of the legatee before the death of the testators, go as directed in a will then or thereafter to be executed by the legatee.*

See **MATTER OF PIFFARD**..... 34

**PRACTICE** — *Reference of a disputed claim against the estate of a deceased person is a special proceeding—an appeal should be taken from the order of the Special Term confirming the referee's report, and not from the judgment—the plaintiff is entitled to recover his disbursements, as a matter of right, under section 817 of the Code of Procedure, which was not repealed by chapter 417 of 1877.*

See **HATCH v. STEWART**..... 164

— *Action by a creditor to set aside a fraudulent conveyance made by a debtor—it cannot be maintained by a general creditor—proof of the non-payment of a claim, allowed by the legal representatives in another State, does not show that the plaintiff has exhausted his legal remedies—although the law of that State will not permit a suit to be brought.*

See **NATIONAL TRADESMAN BANK v. WETMORE**..... 350

— *Actions in tort—a several judgment may be rendered against one of several defendants—liability of a corporation for slandering the business of another corporation carrying on the same business—a pleading should allege that the acts complained of were done by the corporation and not by its agent.*

See **LUBRICATING OIL Co. v. STANDARD OIL Co.**..... 153

**PRACTICE — Continued.**

PAGE.

— *Summary proceedings to recover the possession of land — when the validity of a lease may be attacked in such proceedings by the defendant, for fraud — when an equitable action to cancel the lease will lie.*

See **BECKER v. CHURCH**..... 258

— *As to which party has the affirmative of the issue — evidence — hypothetical opinions inadmissible — when a verdict will be set aside because of the admission of irrelevant evidence.*

See **BENEDICT v. PENFIELD**..... 176

— *Action to reach the surplus income of a trust fund — the habits and ability of the cestui que trust are to be considered in determining the amount to be allowed to him for his maintenance — the plaintiff must prove that there is a surplus.*

See **KILROY v. WOOD**..... 636

— *Admeasurement of dower — question as to whether a specific parcel of land can be set aside — at what time and in what manner it must be determined — the rights of all the parties must be considered — Code of Civil Procedure, § 1610.*

See **O'DOUGHERTY v. REMINGTON PAPER CO.**..... 193

— *Extra allowance — when it cannot be granted — effect of a notice attached to a summons that judgment will be taken for an amount named*

See **ADAMS v. SULLIVAN**..... 278

— *Motion to vacate an attachment — when it may be made after the denial of a previous motion therefor — Code of Civil Procedure, § 683.*

See **THALHEIMER v. HAYS**..... 98

— *Error in the charge of the court as to the measure of damages — an exception thereto will not be sustained, when the charge was based upon a fact the existence of which was assumed by the court and both parties upon the trial.*

See **VAIL v. REYNOLDS**..... 647

— *Enforcement of a direction in an order requiring costs or money to be paid to any person — the remedy is by execution and not by attachment — Code of Civil Procedure, § 779.*

See **FURSTMAN v. SCHULTING**..... 648

— *Admissibility of the confession of a defendant in an action for adultery — a decree will be granted when all just reason to believe that collusion exists is removed.*

See **MADGE v. MADGE**..... 524

— *Submission of a case upon agreed facts — Code of Civil Procedure, § 1279 — power of the court to amend the agreement as to the relief to be granted — when the power will not be exercised.*

See **KINGSLAND v. MAYOR, ETC.**..... 599

— *Proceedings for the sale of the real estate of a decedent to pay his debts — what allegations the petition should contain when made by a creditor — costs cannot be allowed by the surrogate until the proceeds of the sale have been paid to the county treasurer.*

See **MATTER OF LAIRD v. ARNOLD**..... 186

— *Power of the court to allow additional affidavits to be read on a motion to vacate an attachment — to order such affidavits to be filed nunc pro tunc — a party accepting a payment under an order cannot thereafter object to such order.*

See **FISHER v. DOUGHERTY**..... 167

— *Place of trial of an action to set aside as fraudulent a general assignment covering real estate — the right to demand a change of venue cannot be defeated by an offer by the plaintiff to stipulate not to attempt to reach the real estate.*

See **WYATT v. BROOKS**..... 502

— *Contempt of court — actual loss or injury must be proved, to support a fine to indemnify the party injured, imposed under section 2281 of the Code of Civil Procedure — when a fine imposed under section 2281 cannot be changed on appeal to a fine for punishment — proper order to be entered in such cases.*

See **FALL BROOK COAL CO. v. HECKSHER**..... 584

**PRACTICE — Continued.**

PAGE

- *Inspection of books and papers — an order compelling their production will not be granted unless it is needed to enable the party to present his own case.*  
See *SANGER v. SEYMOUR*..... 641
- *Action for partition — a tenant by the curtesy of an undivided share may maintain it — Code of Civil Procedure, § 1582.*  
See *TILTON v. VAIL*..... 638
- *Pleadings — right of the plaintiff to any relief he may be entitled to upon the case made — when one tenant in common may recover, for use and occupation, from a co-tenant who excludes him from the possession of the premises.*  
See *MULDOWNEY v. MORRIS AND ESSEX R. R. Co.*..... 444
- *Action by the receiver of a corporation to determine the validity of bonds claimed to be secured by a mortgage on its property — when it can be maintained.*  
See *HUBBELL v. SYRACUSE IRON WORKS*..... 182
- *Criminal pleadings — what must be alleged in an indictment in order to justify a conviction of grand larceny for obtaining goods under false pretenses, under section 528 of the Penal Code.*  
See *PEOPLE v. DUMAR*..... 80
- *The grantor must be made a party to an action to set aside a conveyance as fraudulent.*  
See *HUBBELL v. MERCHANTS' NAT. BANK*..... 200
- *When the treasurer of a village is its chief fiscal officer within the meaning of section 3245 of the Code of Civil Procedure.*  
See *FISHER v. VILLAGE OF CORTLAND*..... 178
- *Costs — there must be a recovery to entitle a defendant, succeeding on some of the issues, to recover costs — Code of Civil Procedure, § 3284.*  
See *CROSBY v. COBB*..... 166
- *Power of the court to correct erroneous assessments on the hearing of a certiorari to review them — Code of Civil Procedure, § 2141.*  
See *PEOPLE EX REL. NEUSTADT v. COLEMAN*..... 581
- *Surrogate — order opening decree — how reviewed — Code of Civil Procedure, § 2481, sub. 6.*  
See *PEOPLE EX REL. STEVENS v. LOTT*..... 408
- *Order granting a new trial, after a conviction of a crime, upon the ground of newly discovered evidence — the people cannot appeal therefrom.*  
See *PEOPLE v. BECKWITH*..... 366
- *Power of the court to order a reference to take testimony as to facts, and to refuse to enter an interlocutory judgment — such an order is appealable — Code of Civil Procedure, § 1847, sub. 4.*  
See *CENTRAL TRUST Co. v. N. Y. CITY AND NORTHERN RY. Co.*.... 602
- *Motion to dismiss an appeal to the County Court because of a failure of the sureties upon an undertaking to justify — the right to so move is not lost by the service of a notice of retainer or of trial — Code of Civil Procedure, § 8069.*  
See *SLATTERY v. HASKIN*..... 86
- *A motion for a new trial on the minutes of the justice can only be made when a verdict has been rendered — Code of Civil Procedure, § 999 — power of a Special Term to entertain a motion to vacate an order erroneously granted.*  
See *FIRST NAT. BANK v. CLARK*..... 90
- *Sale by assignees in bankruptcy under the United States statute, chapter 9 of 1841 — power of the court to order a private sale without specifying the time thereof.*  
See *GIGNOUX v. STAFFORD*..... 426
- *Reference of disputed claims against an estate — what claims may be passed by the referee — his report, when confirmed, binds the surrogate and can only be reviewed on appeal.*  
See *MATTER OF GRAY*..... 411
- *Refusal of an executor or administrator to refer a claim — when the claimant is entitled to recover costs — effect of the certificate of the judge or referee as to the refusal to refer — Code of Civil Procedure, § 1836.*  
See *ELY v. TAYLOR*..... 205

<b>PRACTICE — Continued.</b>	<b>PAGE.</b>
— <i>Offer of judgment on appeal from a judgment in a Justice's Court — right of the party accepting it to costs — Code of Civil Procedure, § 3070.</i> <i>See HOLLENBACK v. KNAPP</i> .....	207
— <i>Bond of marshal of the city of New York — a party aggrieved cannot, under an order of a justice of the Court of Common Pleas, prosecute it in the Supreme Court — 1862, chap. 484.</i> <i>See MOOG v. KEHOE</i> .....	494
— <i>Letters of administration — when they may be granted without issuing a citation to non-residents — Code of Civil Procedure, § 2662.</i> <i>See LIBBEY v. MASON</i> .....	470
— <i>Negligence — when a disputed question of fact should be submitted to a jury.</i> <i>See MCCARRAGHER v. GASKELL</i> .....	451
— <i>Proceedings for the removal of a guardian — may be commenced by a petition — the Supreme Court has power to remove a testamentary guardian.</i> <i>See MATTER OF KING</i> .....	607
<b>PRINCIPAL AND AGENT</b> — <i>Liability of a corporation for slandering the business of another corporation carrying on the same business — a pleading should allege that the acts complained of were done by the corporation, and not by its agent.</i> <i>See LUBRICATING OIL CO. v. STANDARD OIL CO.</i> .....	158
— <i>Deed — when one executed by an attorney, "Francis Meriam, attorney, by Eliza Meriam," will be held to pass the title of Eliza Meriam, the principal.</i> <i>See ROBBINS v. AUSTIN</i> .....	469
<b>PRINCIPAL AND SURETY</b> — <i>Bond of a deputy sheriff for the faithful discharge of his duties — the sureties thereon are bound only for acts done after its delivery — the presumption of its delivery upon the day of its date is destroyed by proof of the time of its actual delivery.</i> <i>See REILLY v. DODGE</i> .....	646
— <i>Accommodation indorser — when he cannot compel the guarantor of a note to contribute.</i> <i>See PHILLIPS v. PLATO</i> .....	189
<b>PRIVITY</b> — <i>Evidence — the rule excluding oral evidence, tending to vary the terms of a written agreement, does not apply to one who is a stranger to it.</i> <i>See NORTON v. KROGH</i> .....	611
<b>PROCEDURE:</b> <i>See PRACTICE.</i>	
<b>PROFITS</b> — <i>Prospective right to recover on breach of contract.</i> <i>See CONTRACT.</i>	
<b>PROOF</b> — <i>Burden of.</i> <i>See EVIDENCE.</i>	
<b>PROPERTY:</b> <i>See PERSONAL PROPERTY</i> <i>REAL PROPERTY.</i>	
<b>PUBLIC BUSINESS</b> — <i>Corporations engaged in — duty of — to serve all impartially.</i> <i>See CORPORATIONS.</i>	
<b>PUBLIC STREETS:</b> <i>See MUNICIPAL CORPORATIONS.</i>	
<b>PUBLIC WORK</b> — <i>Awarding contract to the lowest bidder.</i> <i>See CONTRACT.</i>	
<b>PUNITIVE DAMAGES:</b> <i>See DAMAGES.</i>	

**RAILROAD** — *When an underground railroad is a street railroad within section 18 of article 8 of the Constitution.*] The petitioner, a corporation duly organized and incorporated under chapter 140 of 1850, to construct, maintain and operate a railroad for public use between certain points in the city of New York, having adopted plans which rendered it necessary to build said route underground, and to run the same by a tunnel underneath the streets, roads and public places of the city, and having made diligent efforts to obtain the consent of the owners of one-half in value of the property bounded on the line of the streets, roads and public places through which it was proposed to construct such railroad, and being unable to obtain the consent of such property owners, applied to the General Term of the Supreme Court to appoint three commissioners who should determine, after a hearing of all parties interested, whether such railroad ought to be allowed to be built underneath said streets, roads and public places, as provided in section 1 of chapter 582 of 1880.

*Held*, that the underground railway, which the petitioner proposed to construct, was "a street railroad," within the meaning of those words as used in section 18 of article 8 of the Constitution of the State of New York, forbidding the passage of any law authorizing the construction and operation of a street railroad, except upon the condition that the consent of the owners of one-half in value of the property bounded on, and of the local authorities having the control of that portion of the street or highway upon which it is proposed to construct and operate it be first obtained, and providing that in case the consent of the property owners cannot be obtained then the determination of the commissioners, to be appointed as therein provided, shall be taken in lieu thereof.

MATTER OF N. Y. DISTRICT RAILWAY CO. .... 621

2. — *Chapter 582 of 1880 is unconstitutional as violating this section.*] That so much of the first section of chapter 582 of 1880, as provided that "the determination by said commissioners, confirmed by the court, may be taken in lieu of the consent of *said authorities* and property owners," is unconstitutional and void.

That the court could not sever the effect which the act gives to its confirmation of the commissioners decision, holding the confirmation effective as a substitute for the consent of the property owners and ineffective as a substitute for the consent of the city authorities.

That the application for their appointment should, therefore, be denied, as legal machinery should not be set in motion to bring about a result forbidden by the organic law. *Id.*

3. — *Regulation of a horse railroad company as to the return of money deposited in a fare box by mistake — when unreasonable.*] The plaintiff, on entering one of the defendant's cars, which was operated by a driver without a conductor, put into the box, used for that purpose, five fares for himself and three companions. Upon discovering his mistake and applying to the driver for the restoration of the excessive fare placed in the box, the driver refused to restore it, alleging that he had no authority to return the fare or correct the mistake, and directed the plaintiff to repair to the office of the company for his money. During a wordy altercation between the plaintiff and the driver, a lady entered the car and delivered her five cents fare to the plaintiff who placed it in his pocket. The plaintiff having refused to deposit the fare in the box, the driver, after the lady had reached her destination and left the car, removed the plaintiff from the car and delivered him into the custody of a policeman, who confined him in a station-house until the following morning, when he was discharged by the court.

Upon an appeal from a judgment, entered upon an order dismissing the complaint made upon the trial of this action, brought to recover damages for an assault and false imprisonment:

*Held*, that a regulation of the company requiring a passenger, who may be deprived of his money by his own mistake in this manner, to go to the office of the company for its reimbursement, and the correction of the mistake is entirely unreasonable.

CORBETT v. TWENTY-THIRD STREET RAILWAY CO. .... 587

4. — *Right of a person depositing it to retain a fare received from another passenger.*] That the plaintiff was clearly entitled to a restitution of the money

**RAILROAD — Continued.**

PAGE.

deposited by him by mistake in the box, and that it was entirely reasonable for him to retain the fare received from the other passenger, and thus reimburse himself for the money inadvertently placed in the box. *Id.*

5. — *Liability of the company for the act of its driver in causing the arrest of a passenger.*] That, as the driver removed the plaintiff from the car, and placed him in the custody of the officer, under the authority conferred upon him for the management of the car by the defendant, the latter became legally liable to the plaintiff for the damages to which he, in that manner, had been subjected.

That this liability included the entire injury and indignity to which the plaintiff was subjected, not only by his removal from the car, but by his subsequent imprisonment and detention in the station-house. *Id.*

6. — *Contract between railroad companies, to endeavor to promote each other's interests — when not void as against public policy — a plea of ultra vires will not lie in favor of a party who has received benefits under the contract.*] The plaintiff and defendant, each being a railroad company, entered into an agreement by which the plaintiff agreed that it would at all times deliver to the defendant, for transportation, all the freight and passengers that it could lawfully control or influence, destined to points that could be reached by way of the railroad of the defendant, or its connections, and that it would use its influence to promote the interests and the business of the defendant company, as far as it could, with proper regard for its own interests. The defendant company agreed that, so far as it could, with a proper regard for its own interests, it would use its influence and exercise its control to promote the interests and the business of the plaintiff company; it also agreed to make good any deficiencies in the net earnings of the plaintiff company to meet the interest upon its present bonded indebtedness, from time to time, as the same should become due and payable.

It was further agreed that, for the protection of the defendant company, in rendering assistance to the plaintiff company, the latter should cause to be deposited with the defendant company a majority of the capital stock of the plaintiff company in such manner as should be required, and that, so long as the management of the plaintiff company should be satisfactory to the defendant company, the latter would give, or cause to be given, to such representatives of the plaintiff company as should be designated by it, the right to vote upon the stock so deposited.

Upon the trial of this action, brought by the plaintiff to compel the defendant to pay certain sums which the defendant had become liable to pay under the terms of the contract, the complaint was dismissed upon the ground that the contract was contrary to public policy and void.

*Held*, that it was error so to do, as the arrangement was not *per se* void.

That if the question be considered as purely one of *ultra vires*, then it was obvious that the defendant was in no condition to avail itself of that objection, as it had entered upon, and enjoyed the benefit of, the contract for a long period of time, and could not now assert that the contract was void because it (the defendant) had no power to secure its performance in the manner stipulated in the instrument.

TONAWANDA R. R. Co. v. N. Y., L. E. & W. R. R. Co. . . . . 496

7. — *Liability of a railroad for injuries to a passenger — when it is responsible for injuries resulting from acts done under the direction of its conductor.*] A military organization, whose headquarters were at Rochester, having agreed to give a public entertainment at the village of Brockport, one of its members engaged of the defendant, a railroad company, passage for all its members from Rochester to Brockport and return. The members were carried to Brockport in a separate car, which was, after they had left it, run upon a side track, to the west of and beyond the station grounds, so that the west end of the car rested upon a bridge upon which the railroad crossed, at a height of twelve feet, a village street. Before ten o'clock in the evening the car was lighted and the doors unlocked, although no person representing the company was left in charge of it. The car could be seen from the hotel where the members of the organization were staying.

At about the time at which the freight train to which this car was to be attached was due at Brockport, most of the members of the

**RAILROAD** — *Continued.*

PAGE.

organization, including the plaintiff, had passed from the platform of the station, across and along the tracks, and had taken their seats in the car. After the freight train had arrived and stopped, its conductor opened the door of the car and said: "Boys come out and give us a shove; shove this car on to the main track so I can hitch on." The plaintiff, with others, arose, went to the door, and seeing the freight train moving on his right-hand side, and fearing to alight on that side, stepped off the steps on the other side and fell through or over the side of the bridge to the street below.

Upon the trial of this action, brought by the plaintiff to recover damages for the injuries so sustained, the plaintiff recovered a verdict, which was, on motion, set aside for the reason that when the plaintiff boarded the car it was outside of the station grounds, and there was not sufficient evidence to justify the jury in finding an agreement or consent by the railroad company that the plaintiff might occupy the car in the place where he found it.

*Held*, error; that the plaintiff's right to recover did not depend upon these facts, but that the question was whether at the time he received the injury the conductor had taken charge of the car and the plaintiff, as a passenger, had placed himself under his care.

BELLMAN v. N. Y. C. AND H. R. R. Co. .... 180

8. — *Assessment of the expenses of the railroad commissioners on railroad companies — the State officers in so doing act judicially — their action may be reviewed on certiorari.* *Certiorari* to review the proceedings of the defendants, as State officers, in making an apportionment of the expenses of the board of railroad commissioners for the year immediately preceding July 1, 1886, pursuant to section 18 of chapter 353 of 1883, which provides that these expenses shall be borne by the several corporations owning or operating railroads "according to their means," and directs the said officers to "assess upon each of said corporations its just proportion of said expenses, one-half in proportion to its net income for the year next preceding that in which the assessment is made, and one-half in proportion to the length of the main track or tracks on (its) road; and such assessment shall be collected in the manner provided by law for the collection of taxes upon corporations."

*Held*, that the State officers in apportioning and assessing the expenses acted in a quasi judicial character, and that their action was reviewable on *certiorari* by a company aggrieved thereby.

PEOPLE EX REL. N. Y. O. AND W. R. Co. CHAPIN. .... 239

9. — *Construction of the provision of section 18 of chapter 353 of 1883.* It was admitted that the assessment was made in proportion to one main track on a road-bed, and not in proportion to the several main tracks there might be thereon.

*Held*, that it was error so to do; that the legislature intended that all the main tracks, and not merely a single one, should be included in the estimate. *Id.*

10. — *Effect of payment by some of the railroads assessed.* That the fact that the return disclosed that the assessment had been completed, and that the amounts assessed upon some of the railroads had been paid by them, did not require the court to dismiss the writ as it was not shown that the respondents delivered to any one, or parted with, the assessment which they had made, nor did it appear that the statute required they should deliver the same to any one. *Id.*

— *Contract for the construction of a railroad — lien on railroad for laborers' wages — right of the person, contracting with the company, to pay claims for services filed by laborers against a second sub-contractor, and apply the same in payment of the amount due to a first sub-contractor to whom such person has sublet the contract — when he does not lose this right by taking an assignment of the claims filed — right to recover, as damages, for a breach of a contract, profits which would have been received if the contract had been completed — such damages are not recoverable where the breach complained of is simply a failure to pay an installment of money due by the terms of the contract.*

See MOORE v. TAYLOR. .... 45

— *Easement of light from a street — right of an abutting owner to recover damages for an interference with it — when one erecting and leasing an elevated*

**RAILROAD—Continued.**

PAGE

road is liable for damages occasioned by the running of trains by the lessee of the road.

See *POND v. METROPOLITAN ELEVATED RY. Co.*..... 567

— *Negligence—when the question of the plaintiff's contributory negligence should be left to the jury—right of one finding the gates at a railroad crossing open to assume that it is safe to cross.*

See *LINDEMAN v. N. Y. C. AND H. R. R. R. Co.*..... 806

— *Right of a railroad company to acquire a lease of a ferry franchise not having either end at the railroad terminus—chap. 193 of 1884.*

See *STARIN v. MAYOR, ETC.*..... 549

**REAL PROPERTY—Evidence—the recital in a sheriff's deed that an execution has been issued does not prove that fact.]** 1. Upon the trial of this action of ejectment, in which both parties claimed title under one Smedes, the plaintiff proved the recovery of a judgment against Smedes, in the Common Pleas of Ulster county, on January 19, 1818; that the deputy county clerk had made diligent search for an execution or *feri facias* upon the judgment and could not find any. He then read in evidence, under the defendant's objection, a sheriff's deed, dated October 15, 1818, conveying the interest of Smedes to one Hasbrouck, under whom the plaintiff claimed, which deed recited the issue of a *feri facias* and the seizure and sale of the property. Neither Hasbrouck nor the plaintiff ever entered into possession of the premises, which were, at the time of the recovery of the judgment and of the sale, in the possession of Smedes, and which, after his death, remained in the possession of his children and those claiming under them, down to the time of the commencement of this action. No other evidence tending to show the existence or issue of the writ of *feri facias* was given.

*Held*, that a finding by the trial court that an execution was duly issued could not be sustained.

That the recital, standing unsupported by any evidence of possession of the premises under the deed, or recognition by Smedes of its validity, or other acts *in pais* tending to support the deed or the recital, was not evidence of the fact of the issue of the execution. *HASBROUCK v. BURHANS.*..... 376

2. — *Presumptions—how indulged.]* That presumptions are indulged either in favor of, or in opposition to, ancient deeds, according to the matters *in pais* which accompany them, and that in this case, no possession having been taken thereunder, the natural presumption was that the deed had performed no function, because, from the lack of the execution, it could not rightfully perform any. *Id.*

3. — *Statute of limitations.]* That the plaintiff was barred by the statute of limitations, as neither he nor his deviser had been seized or possessed of the premises within twenty years before the time of the commencement of this action, and as the premises had been held adversely for more than twenty years by Smedes and those claiming under him. *Id.*

4. — *When a possession will be deemed adverse in case of a tenancy.]* *Seemle*, that assuming the deed to have been valid, and that Smedes' occupation had been that of a tenant at will under the plaintiff, yet as there was no written lease or rent reserved or paid the possession of Smedes, and those claiming under him would have become adverse at the end of twenty years, and the plaintiff's title would be barred by the forty years of their subsequent adverse possession. *Id.*

— *Eminent domain—right of the State to acquire the fee of lands to be used for a canal—of its right to authorize such lands to be used by a city as a public street—1 R. S., 225, 226, §§ 46, 52—1878. chap. 391.*

See *ELDRIDGE v. CITY OF BINGHAMTON.*..... 203

— *Taxation—exemption of buildings and the lots on which they stand, of colleges—1 R. S., 388, § 4, sub. 3, as amended by chap. 397 of 1883—duty of assessors in entering property omitted from the roll of last year.*

See *PEOPLE EX REL. ETC., v. BARBER.*..... 27



**REAL PROPERTY — Continued.**

PAGE.

- *Place of trial of an action to set aside as fraudulent a general assignment covering real estate — the right to demand a change of venue cannot be defeated by an offer by the plaintiff to stipulate not to attempt to reach the real estate.*  
*See* WYATT v. BROOKS..... 502
- *Executory contract for the sale of land — when it is terminated by a conveyance of the fee of the land to a stranger by the vendor.*  
*See* SMITH v. ROGERS..... 110
- *Receiver in supplementary proceedings — the title to only such real estate of the debtor as lies within this State is vested in him — Code of Civil Procedure, § 2468.*  
*See* SMITH v. TOZER..... 23
- *Easement of light from a street — right of an abutting owner to recover damages for an interference with it.*  
*See* POND v. METROPOLITAN ELEVATED RY. CO..... 567
- *Grant of lands by the crown — construction of it — the town of East Hampton took title under the grant from the crown.*  
*See* ATKINSON v. BOWMAN ... 404
- *Proceedings for the sale of the real estate of a decedent to pay his debts — what allegations the petition should contain when made by a creditor.*  
*See* MATTER OF LAIRD v. ARNOLD ..... 186
- *Contract for the sale of real estate — an objection to the title, based on a decision of the General Term of the Supreme Court, will relieve the purchaser from accepting the title.*  
*See* FERRIS v. PLUMMER..... 440
- *When one tenant in common may recover, for use and occupation, from a co-tenant who excludes him from the possession of the premises.*  
*See* MULDOWNEY v. MORRIS AND ESSEX R. R. Co. .... 444
- *Will — when legacies are charged upon real estate.*  
*See* ANDERSON v. DAVISON ..... 431

- RECEIVERS — Receiver of insolvent insurance company — duty of, as to payment of unpreferred claims — no deductions for payments made before his appointment can be made.**  
*See* PEOPLE v. UNIVERSAL LIFE INS. CO ..... 616
- *Action by the receiver of a corporation to determine the validity of bonds claimed to be secured by a mortgage on its property — when it can be maintained.*  
*See* HUBBELL v. SYRACUSE IRON WORKS..... 182
- *Costs — when a receiver of a corporation will be directed to pay them.*  
*See* LOCKE v. COVERT..... 484
- *In supplementary proceedings.*  
*See* EXECUTIONS.

**RECEIVERS' CERTIFICATES:**

*See* CORPORATIONS.

**RECITALS — In deeds.**

*See* DEEDS.

**RECORD — Court of.**

*See* COURTS.

- RECORDING ACT — Easement — a purchaser of a servient tenement is not bound by an easement not disclosed by deeds or apparent use.**  
*See* TAYLOR v. MILLARD. .... 363

- RECORDS — Evidence — the execution of a chattel mortgage is not proved by the production of a copy thereof and of a certificate of acknowledgment attached thereto, certified by the town clerk.**  
*See* MAXWELL v. INMAN..... 265

**RECORDS** — Continued.

PAGE.

— *Filing of a chattel mortgage* — 1888, chap. 379 — a subsequent agreement affecting it need not be filed — its validity is not affected by the fact that part of the agreement rests in parol.

See **PRESTON v. SOUTHWICK**..... 291

— *Chattel mortgages* — where they should be filed in Kings county — 3 R. S. (6th ed.), 148, § 11; 1 R. S. (6th ed.), 924.

See **MARTIN v. ROTHSCHILD**..... 410

**REFERENCE** — *Of disputed claims against an estate* — what claims may be passed by the referee — his report, when confirmed, binds the surrogate and can only be reviewed on appeal.] 1. A claim presented to the administrator of one Charles B. Gray by the appellant, who had indorsed and became surety upon a paper made by Charles B. Gray and C. G. Lockwood, having been rejected by him was referred by consent. The paper was used in a business which Gray and Lockwood were carrying on as partners. The referee reported that the claim was a claim against the estate of Charles B. Gray, and was to be paid with the other individual debts of the deceased. This report was confirmed by this court. Upon the final settlement of the estate a decree was entered directing that the individual creditors were entitled to be first paid in full, and that the balance should be divided among the partnership claimants, among which latter was included the appellant.

*Held*, that the decree should be reversed as the report of the referee, having been confirmed by this court, was binding upon the parties and the surrogate and could only be reviewed by an appeal. **MATTER OF GRAY**... 411

2. — *Of a disputed claim against the estate of a deceased person* — right to costs and disbursements and an extra allowance.] A claim for \$1,000 for damages for breach of a covenant of quiet enjoyment contained in a lease given by the defendant's intestate to the plaintiff, having been presented to and rejected by the defendant, was, by the consent of both parties and with the approval of the surrogate, referred. The referee reported in favor of the plaintiff for six cents damages. The defendant paid the referee's fees, upon the refusal of the plaintiff to do so, took up the report and moved for and obtained an order confirming the same and awarding to the defendant his costs, disbursements and an extra allowance.

*Held*, that the order was right and should be affirmed. **HOPKINS v. LOTT**.. 442

— *To determine as to the existence of judgments or liens on funds arising from a sale in partition* — when a judgment recovered against the executors of the owner will be paid therefrom — interest cannot be charged on an amount advanced from the estate to persons entitled thereto out of the share of such person in the proceeds of sale.

See **PLATT v. PLATT**..... 592

— *Of a disputed claim against the estate of a deceased person is a special proceeding* — an appeal should be taken from the order of the Special Term confirming the referee's report, and not from the judgment — the plaintiff is entitled to recover his disbursements, as a matter of right, under section 317 of the Code of Procedure, which was not repealed by chapter 417 of 1877.

See **HATCH v. STEWART**..... 164

— *Refusal of an executor or administrator to refer a claim* — when the claimant is entitled to recover costs — effect of the certificate of the judge or referee as to the refusal to refer — Code of Civil Procedure, § 1836.

See **ELY v. TAYLOR**..... 205

— *Power of the court to order a reference to take testimony as to facts and to refuse to enter an interlocutory judgment* — such an order is appealable — Code of Civil Procedure, § 1847, sub. 4.

See **CENTRAL TRUST CO. v. N. Y. CITY AND NORTHERN RY. CO.**... 602

**REGULATIONS** — *Of a corporation, when unreasonable.*

See **CORPORATIONS**.

**RELEASE** — *Of premises from the lien of a mortgage* — when the court will not revive the mortgage in favor of the owner of the premises, as against the widow of the mortgagor claiming dower therein.

See **EVERSON v. McMULLEN**..... 369

**RELIGIOUS SOCIETIES** — *Jurisdiction of the court to restrain the trustees of a religious corporation from diverting its property from the church or denomination to which the corporation is attached—1875, chap. 79, and 1876, chap. 176.]*

1. The appellants are the trustees of the First Society of the Methodist Episcopal Church of the town of Cohocton, organized in 1829 under the general law of 1813. In the year 1881 the local society received a conveyance of a parcel of land, upon which a meeting-house has since been erected, in which the grantees were mentioned and described as "Paul C. Cook (and four others), trustees of the First Methodist Episcopal Society of the town of Cohocton, and their successors in office," but which contained no conditions or other reference to any religious organization. By the custom, regulations and discipline of the Methodist Episcopal Church, the bishop presiding at an annual conference possesses full authority, and is charged with the duty, to make the appointment of preachers for the several local districts within his conference.

The relator, a minister of the gospel in good standing in the Methodist Episcopal Church, having been appointed by the bishop presiding at the annual conference held for the year 1885, as the preacher to be located in the Cohocton district, and to occupy for religious purposes the meeting-house owned by the corporation of which the appellants are the trustees, applied to them to be received as the minister of the society and to be allowed to open and use the meeting-house for the purpose of conducting religious exercises. The trustees having refused to receive the relator or to open the meeting-house, he applied for and obtained a *mandamus* compelling them so to do.

*Held*, that since the passage of chapter 79 of 1875, and chapter 176 of 1876, the courts have, by force of the provisions contained in the said acts, jurisdiction to supervise the action of the trustees of religious corporations and to require them to use and manage the property of the corporation according to the rules and usages of the church or denomination to which the corporation belongs, and to restrain them by appropriate orders and decrees in actions or proceedings properly instituted for that purpose by interested parties from diverting the property held by them as trustees, or from using the revenues which come into their hands except for the support and maintenance of the church or denomination to which they are attached.

That it was the duty of the trustees to receive the relator as minister, and to open the meeting-house to him for the purpose of conducting divine worship therein, in conformity to the tenets and discipline of the religious denomination to which he and the corporation was attached.

PEOPLE EX REL. PECK v. CONLEY ..... 98

2. — *When the trustees will be compelled by a mandamus to open the meeting-house to a minister regularly appointed to that place.]* That in refusing to open the meeting-house the trustees violated a plain duty, and that the writ of *mandamus* was a proper remedy to put the relator in possession of the pulpit to which he was entitled. *Id.*

**REMAINDERS** — *Deposit in a bank by a life tenant of moneys received under an insurance policy on a mill — when it will be considered, as between two remaindermen in whose names the deposit was made, as personal property.*

See JAGGER v. BIRD ..... 428

**REMEDIES** — *Election of.*

See ELECTION.

See ATTACHMENT

INJUNCTION.

MANDAMUS.

PRACTICE.

**REPLEVIN** — *Action of replevin to recover goods fraudulently obtained — right of the vendors to deduct, from the amount received for the property sold by him, the value of that portion of the property which could not be replevied and the depreciation in the value of the portion replevied — an assignee for the benefit of creditors cannot object to the failure of the plaintiffs to make a tender to the assignor.* This action was brought against the assignee of one Dimmick to recover a quantity of goods and chattels sold by the plaintiffs to Dimmick, upon the

**REPLEVIN** — *Continued.*

PAGE

ground that the property was obtained by fraud. The contract-price was \$273.39, on which there was paid, at the time of the sale, \$100, credit being given for the balance. The sale was made on October twenty-ninth, and the general assignment was made on November twenty-fifth following. The \$100 paid by Dimmick on the purchase was not returned or tendered to Dimmick, nor to the defendant, prior to the commencement of the action, but on the trial there was tendered by the plaintiffs to the defendant twenty-six dollars and sixty-one cents, being the balance of the \$100, after deducting the value of the goods disposed of before the replevy was made and the depreciation in value of the goods replevied.

*Held*, that the tender was sufficient.

That the objection that no restoration, or tender of restoration, had been made to Dimmick, could not be raised by the defendant, who, as the assignee of the property for the benefit of Dimmick's creditors, was not a *bona fide* purchaser for value, and must be deemed to have taken the property with notice and knowledge of Dimmick's fraud in obtaining it.

**SCHOONMAKER v. KELLY**..... 299

— *Undertaking to secure a return of chattels — form of — Code of Civil Procedure* §§ 1698, 1704.

*See* **WEBER v. MANNE**..... 557

**REPRESENTATIONS** — *In contracts for the sale of personal property.*

*See* **SALES**.

**RES ADJUDICATA:**

*See* **JUDGMENT**.

**RES GESTÆ** — *What is admissible in evidence as part of.*

*See* **EVIDENCE**.

**RESCISSION** — *Of contract.*

*See* **CONTRACTS**.

**RESIDENCE:**

*See* **DOMICILE**.

**REVIEW:**

*See* **APPEAL**.

**CERTIORARI**.

**REVISED STATUTES** — 1 R. S., 225, 226, §§ 46, 52 — *Eminent domain — right of the State to acquire the fee in lands to be used for a canal — of its right to authorize such lands to be used by a city as a public street* — 1878, chap. 391.

*See* **ELDRIDGE v. CITY OF BINGHAMTON**..... 902

— 1 R. S., 346, § 21 — *Defects in a constable's bond* — 1 R. S., 346, § 21, as amended by chap. 788 of 1872 — *until removed the constable's acts are to be treated as those of an officer de jure as to third persons.*

*See* **ADAMS v. TATOR**..... 884

— 1 R. S., 388, § 4, sub. 3 — *Taxation — exemption of buildings, and the lots on which they stand, of colleges* — 1 R. S., 388, § 4, sub. 3, as amended by chap. 397 of 1883 — *duty of assessors in entering property omitted from the roll of last year.*

*See* **PEOPLE EX REL. v. BARBER**..... 27

— 1 R. S., 389, § 5 — *Taxation — exemption of moneys deposited by a non-resident for investment here* — 1 R. S., 389, § 5, as amended by chap. 176 of 1851, and 1 R. S., 419, § 8.

*See* **PEOPLE EX REL. FERRER v. COMMISSIONERS**..... 560

— 1 R. S., 419, § 3 — *Taxation — exemption of moneys deposited by a non-resident for investment here* — 1 R. S., 389, § 5, as amended by chap. 176 of 1851.

*See* **PEOPLE EX REL. FERRER v. COMMISSIONERS**..... 560

— 1 R. S. (6th ed.), 924 — *Chattel mortgages — where they should be filed in Kings county* — 3 R. S. (6th ed.), 143, § 11; 1 R. S. (6th ed.), 924.

*See* **MARTIN v. ROTHSCHILD**..... 410

**REVISED STATUTES—Continued.**

PAGE.

— 3 R. S. (6th ed.) 143, § 11—*Chattel mortgages—where they should be filed in Kings county*—3 R. S. (6th ed.), 143, § 11; 1 R. S. (6th ed.), 924.

See MARTIN v. ROTHSCHILD..... 410

[See sections of the Revised Statutes cited, *ante*, in this volume.]

**REVIVOR—Of a paid debt.**

See DEBTOR AND CREDITOR.

**ROAD:**

See HIGHWAY.

**SALES**—*Representations on a sale of chattels—when they constitute a warranty, which survives the acceptance of the goods.*] 1. The defendant accepted an offer of the plaintiff to butcher fifteen hogs, owned by him, and sell the pork to the defendant, upon the statement of the plaintiff that there were not any stags, coarse or unmerchantable hogs among them, and that they were a choice, first-class lot. It was proved upon the trial that upon an examination of the dressed hogs, which were delivered during the defendant's absence from his store, it was found that one of them, weighing 894 pounds, was, when butchered, a hog from which only one testicle had been taken in castration, the other not being found, and that the pork of such an animal was not merchantable and was of little value.

*Held*, that the representations upon which the defendant agreed to buy the pork were a warranty of quality, and that there was a breach thereof, which was not waived by the acceptance of the pork, and which entitled the defendant to recover, as damages, the difference in value between the pork as it was and such pork as it was represented to be.

HUNT v. VAN DEUSEN..... 392

2. — *A rule of damages will be followed notwithstanding proof that the vendee sustained none.*] That it was error to compel the defendant, who made the pork into sausages and lard, to answer that he sold the sausages and lard at the ordinary price, as the plaintiff could not, because of the dexterity of the vendee, escape from the damages as measured by the rule above stated.

That it was not competent for the plaintiff to prove, by several witnesses, that each of them had had a hog of this description, and how he treated it, and that he did not discover that the pork differed from his other pork. *Id.*

— *Action of replevin to recover goods fraudulently obtained—right of the vendor to deduct, from the amount received for the property sold by him, the value of that portion of the property which could not be replevied, and the depreciation in the value of the portion replevied—an assignee for the benefit of creditors cannot object to the failure of the plaintiff to make a tender to the assignor.*

See SCHOONAKER v. KELLEY..... 299

— *Contract for a sale of iron—right of the purchaser to reject such as is not of the quality specified—when the examination is not required to be made at the place of shipment—when the purchaser may accept part and reject the remainder of the iron delivered—when he may reject iron not loaded on the vessel at the port specified in the contract.*

See PIERSON v. CROOKS..... 571

— *Proceedings for the sale of the real estate of a decedent to pay his debts—what allegations the petition should contain when made by a creditor.*

See MATTER OF LAIRD v. ARNOLD..... 136

— *Sales from a trustee to infant beneficiaries will not be sustained.*

See HYLAND v. BAXTER..... 9

— *In partition.*

See PARTITION.

— *On foreclosure.*

See MORTGAGE.

**SCHOOLS**—*Pleadings—what facts should be alleged in the complaint in an action by a school teacher against the trustees of the district.*

See ELLIS v. SHARP..... 179

**SEAL**—*Presumption that an instrument was sealed.*  
*See CONTRACT.*

PAGE.

- SESSION LAWS**—1850, chap. 324—*Board of health—expenses incurred in abating a nuisance are to be charged upon the occupant*—1850, chap. 324, as amended by chap. 169 of 1854; chap. 790 of 1867, and chap. 761 of 1868.  
*See PRENDERGAST v. VILLAGE OF SCHAGHTICOKE.*..... 317
- 1851, chap. 176—*Taxation—exemption of moneys deposited by a non-resident for investment here*—1 R. S., 389, § 5, as amended by chap. 176 of 1851, and 1 R. S., 419, § 3.  
*See PEOPLE EX REL. FERRER v. COMMISSIONERS.*..... 500
- 1854, chap. 169—*Board of health—expenses incurred in abating a nuisance are to be charged upon the occupant*—1850, chap. 324, as amended by chap. 169 of 1854; chap. 790 of 1867, and chap. 761 of 1868.  
*See PRENDERGAST v. VILLAGE OF SCHAGHTICOKE.*..... 317
- 1862, chap. 484—*Bond of a marshal of the city of New York—a party aggrieved cannot, under an order of a justice of the Court of Common Pleas, prosecute it in the Supreme Court.*  
*See MOOG v. KEHOE.*..... 494
- 1867, chap. 790—*Board of health—expenses incurred in abating a nuisance are to be charged upon the occupant*—1850, chap. 324, as amended by chap. 169 of 1854, chap. 790 of 1867 and chap. 761 of 1868.  
*See PRENDERGAST v. VILLAGE OF SCHAGHTICOKE.*..... 317
- 1868, chap. 761—*Board of health—expenses incurred in abating a nuisance are to be charged upon the occupant*—1850, chap. 324, as amended by chap. 169 of 1854, chap. 790 of 1867 and chap. 761 of 1868.  
*See PRENDERGAST v. VILLAGE OF SCHAGHTICOKE.*..... 317
- 1872, chap. 788—*Defects in a constable's bond*—1 R. S., 346, § 21, as amended by chap. 788 of 1872—*until removed the constable's acts are to be treated as those of an officer de jure as to third persons.*  
*See ADAMS v. TATOR.*..... 384
- 1873, chap. 648—*Civil damage act—when exemplary damages may be recovered against the lessor.*  
*See REID v. TERWILLIGER.*..... 310
- 1873, chap. 863, § 14, tit. 11—*Dismissal of members of the police force of Brooklyn*—1873, chap. 863, § 14, tit. 11, as amended by chap. 457 of 1881.  
*See PEOPLE EX REL. HAYES v. CARROLL.*..... 438
- 1875, chap. 79—*Jurisdiction of the court to restrain the trustees of a religious corporation from diverting its property from the church or denomination to which the corporation is attached*—1875, chap. 79, and 1876, chap. 176—*when the trustees will be compelled by a mandamus to open the meeting-house to a minister regularly appointed to that place.*  
*See PEOPLE EX REL. PECK v. CONLEY.*..... 96
- 1875, chap. 370—*Charter of the city of Elmira—over what offences exclusive jurisdiction is conferred on the recorder.*  
*See PEOPLE EX REL. MILLER v. COOPER.*..... 196
- 1875, chap. 567, § 24—*Tax collector—effect of his failure to give a bond as required by section 24 of chapter 567 of 1875—when his acts done under the warrant are rendered valid by the subsequent giving of the bond.*  
*See DUNTLEY v. DAVIS.*..... 229
- 1875, chap. 611, § 21—*False certificate as to the stock of a company being paid in full*—1875, chap. 611, § 21—*over valuation of property purchased by a company and paid for in stock.*  
*See HUNTINGTON v. ATTRILL.*..... 459
- 1876, chap. 176—*Jurisdiction of the court to restrain the trustees of a religious corporation from diverting the property from the church or denomination to which the corporation is attached*—1875, chap. 79.  
*See PEOPLE EX REL. PECK v. CONLEY.*..... 96

## SESSION LAWS—Continued.

PAGE.

— 1877, chap. 321 — *Forfeiture of a policy of insurance by the non-payment of the premium — what notice must be given to the policyholder.*

See *PHELAN v. NORTHWESTERN MUTUAL LIFE INS. CO.*..... 419

— 1877, chap. 417 — *Reference of a disputed claim against the estate of a deceased person, is a special proceeding — an appeal should be taken from the order of the Special Term confirming the referee's report, and not from the judgment — the plaintiff is entitled to recover his disbursements, as a matter of right, under section 317 of the Code of Procedure, which was not repealed by chapter 417 of 1877.*

See *HATCH v. STEWART.*..... 164

— 1877, chap. 417 — *Receiver in supplementary proceedings — power conferred by sections 297, 298, Code of Procedure, upon the judge acting in such proceedings to order any property of the judgment debtor not exempt from execution to be applied towards the satisfaction of the judgment, ceased upon the repeal of said sections by said act.*

See *SMITH v. TOZER.*..... 23

— 1878, chap. 391 — *Eminent domain — right of the State to acquire the fee in lands to be used for a canal — of its right to authorize such lands to be used by a city as a public street — 1 R. S., 225, 226, §§ 46, 52.*

See *ELDRIDGE v. CITY OF BINGHAMTON.*..... 202

— 1880, chap. 36 — *Evidence — only experts can express an opinion as to genuineness of a signature — 1880, chap. 36 — witness — impeachment of, by proof of contradictory statements.*

See *MCKAY v. LASHER.*..... 270

— 1880, chap. 582 — *When an underground railroad is a street railroad within section 18 of article 3 of the Constitution — chap. 582 of 1880 is unconstitutional as violating this section.*

See *MATTER OF THE N. Y. DISTRICT RAILWAY CO.*..... 621

— 1881, chap. 457 — *Dismissal of members of the police force of Brooklyn — 1878, chap. 868, § 14, title 11, as amended by chap. 457 of 1881.*

See *PEOPLE EX REL. HAYES v. CARROLL.*..... 488

— 1881, chap. 581 — *In what cases an action to restrain illegal acts will lie by a taxpayer under.*

See *STARIN v. MAYOR, ETC.*..... 549

— 1882, chap. 353, § 18 — *Assessment of the expenses of the railroad commissioners on railroad companies — the State officers in so doing act judicially — their action may be reviewed on certiorari — construction of the provision of section 18 of chapter 353 of 1882.*

See *PEOPLE EX REL. N. Y. AND O. W. R. CO. v. CHAPIN.*..... 239

— 1882, chap. 410, §§ 170, 180, 716 — *Leases of wharves in New York by the commissioners of the sinking fund — void if not let at public auction — right of a railroad company to acquire a lease of a ferry franchise.*

See *STARIN v. MAYOR, ETC.*..... 549

— 1882, chap. 410, § 820 — *Power of the commissioners of taxes in New York city to correct erroneous assessments.*

See *PEOPLE EX REL. NEUSTADT v. COLEMAN.*..... 581

— 1883, chap. 175 — *Mutual benefit life assurance companies — duty of such companies to resist the payment of illegal claims.*

See *MAYER v. EQUITABLE LIFE ASSOCIATION.*..... 237

— 1883, chap. 279 — *Filing of a chattel mortgage — a subsequent agreement affecting it need not be filed — its validity is not affected by the fact that part of the agreement rests in parol.*

See *PRESTON v. SOUTHWICK.*..... 291

— 1883, chap. 298, tit. 3, § 14, sub. 15, 20 — *License for places of amusement — in Albany a discretionary power is vested in the mayor — when its exercise will not be reviewed by the court.*

See *PEOPLE EX REL. DORR v. THACHER.*..... 349

**SESSION LAWS**—*Continued.*

PAGE.

— 1883, chap. 897 — *Taxation — exemption of buildings and the lots on which they stand, of colleges* — 1 *Revised Statutes*, 883, section 4, subdivision 3, as amended by chapter 897 of 1883.

See *PEOPLE EX REL., ETC., v. BARBER*..... 27

— 1884, chap. 48 — *Commissioners of excise in the city of New York* — may be appointed by the mayor without confirmation by the board of aldermen.

See *PEOPLE EX REL. HAUGHTON v. ANDREWS*..... 814

— 1884, chap. 198 — *Right of a railroad company to acquire a lease of a ferry franchise not having either end at the railroad terminus.*

See *STARLIN v. MAYOR, ETC.*..... 549

— 1884, chap. 280, § 3 — *Right of a board of supervisors, compelled to advertise for proposals and to award the contract to the lowest bidder, to reserve a right to reject bids.*

See *PEOPLE EX REL. CARLIN v. SUPERVISORS*..... 456

— 1885, chap. 342 — *Mechanics' lien* — does not exist until notice is filed — it only effects such interest as the owner then has — 1885, chap. 342.

See *MUNGER v. CURTIS*..... 465

[See table of Session Laws cited, *ante*, in this volume.]

**SET-OFF** — *When allowed in equity as against an assignee, where the debt sought to be set-off was not due at the time of the making of a general assignment by the insolvent debtor.* On September 10, 1884, the plaintiffs indorsed and discounted, at a bank in Rochester, a note for \$5,000, made by the firm of Buchman Brothers & Co., to the order of, and indorsed by, the firm of Rindskopf Brothers & Co., of the city of New York, and remitted the proceeds thereof to the said firm of Rindskopf Brothers, being induced to so act by the representation made to them by the latter firm that the note was as good as the Bank of England, and that the plaintiffs would run no risk in indorsing it. Upon the maturity of the note, on December 22, 1884, the plaintiffs were compelled to pay the note.

At the time the note was given, the firm of Buchman Brothers & Co. was, and ever since has been, insolvent, and on September 20, 1884, it made a general assignment. The firm of Rindskopf Brothers & Co. was, at the time of the delivery of the note, and ever since has been, insolvent, and on December 19, 1884, made a general assignment to the defendant.

In this action, brought by the plaintiffs to have the amount so paid by them set off, and applied in extinguishment of an indebtedness of the plaintiffs to the firm of Rindskopf Brothers & Co., which became due and payable about January 1, 1885, a judgment was rendered in their favor.

*Held*, that it should be affirmed. *ROTHSCHILD v. MACK*..... 72

— *What counter-claim cannot be pleaded in an action of tort.*

See *HINKLEY v. TROY AND ALBIA R. R. Co.*..... 281

**SHERIFF** — *Bond of a deputy sheriff for the faithful discharge of his duties — the sureties thereon are bound only for acts done after its delivery — the presumption of its delivery upon the day of its date is destroyed by proof of the time of its actual delivery.*

See *REILLY v. DODGE*..... C46

**SHIPPING** — *Rules for navigation of vessels — when a vessel is to be considered as an "overtaking" and not a "crossing" vessel, within the meaning of Navigation Rules 17, 22, 23 and 24.* This action was brought to recover damages sustained by the plaintiffs' sloop by a collision with the defendant's lighter in the East river. Both vessels were beating up the river with the wind dead ahead, and at the time of the collision both were on the starboard tack, the lighter being to the windward. The sloop entered the East river after the lighter, and sailed faster than the lighter and closer to the wind. The captain of the sloop finding that she could not cross ahead or at the stern of a tug and her tow, which were also going up the river, caused her helm to be put down and signaled to the lighter to go about, which it attempted to do, but did not succeed in accomplishing in time to avoid a collision with the sloop. There was nothing in the evidence fixing, with even approximate accuracy, the difference in the courses of the vessels.



**SHIPPING — Continued.**

PAGE.

*Held*, that even if it were assumed that there was a difference of three points between the courses of the vessels, the sloop was to be considered as an overtaking vessel, and not as a crossing vessel, within the meaning of these terms as used in the navigation rules, and was bound to keep out of the way of the lighter. *ALDRIDGE v. CLAUSEN*. . . . . 478

**SKATING RINK — Civil rights — an owner of a skating rink refusing to sell tickets to a colored person is guilty of a misdemeanor — Penal Code, § 388.**  
*See* *PEOPLE v. KING*. . . . . 186

**SLANDER — Liability of a corporation for slandering the business of another corporation carrying on the same business — what facts show this to have been done — a pleading should allege that the acts complained of were done by the corporation and not by its agent.**  
*See* *LUBRICATING OIL CO. v. STANDARD OIL CO.*. . . . . 158

**SOLDIERS AND SAILORS' HOME — Residence — when acquired by an inmate of the Soldiers and Sailors' Home at Bath.**  
*See* *SILVEY v. LINDSAY*. . . . . 116

**SPECIFIC PERFORMANCE — When a condition of a bond will be treated as an agreement — when specific performance thereof will be enforced — the court will not direct specific performance when a party is unable to perform his contract.**  
*MARTIN v. COLBY*. . . . . 1

**SPECIAL PROCEEDING — Reference of a disputed claim against the estate of a deceased person, is a special proceeding — an appeal should be taken from the order of the Special Term confirming the referee's report, and not from the judgment — the plaintiff is entitled to recover his disbursements, as a matter of right, under section 317 of the Code of Procedure which was not repealed by chapter 417 of 1875.**  
*See* *HATCH v. STEWART*. . . . . 164

**SPECIAL TERM — Powers of.**  
*See* *COURTS*.

**STATUTES:**  
*See* *REVISED STATUTES*,  
*SESSION LAWS*,  
*U. S. STATUTES*.

**STATUTE OF LIMITATIONS:**  
*See* *LIMITATION OF ACTIONS*.

**STOCK — Of an infant — setting aside a transfer of it.**  
*See* *INFANT*.  
 — *Of a corporation,*  
*See* *CORPORATIONS*.

**STREETS — Eminent domain — right of the State to acquire the fee in lands to be used for a canal — of its right to authorize such lands to be used by a city as a public street — 1 R. S., 225, 226, §§ 46, 52 — 1878 chap. 391.**  
*See* *ELDRIDGE v. CITY OF BINGHAMTON*. . . . . 202  
*See* *MUNICIPAL CORPORATION*.

**SUBMISSION — Of a controversy, without action.**  
*See* *PRACTICE*.

**SUBROGATION — Of creditors generally**  
*See* *DEBTOR AND CREDITOR*.

**SUICIDE — Mutual benefit association — suicide is not a violation, or an attempt to violate, a criminal law — duty of a corporation to make an assessment to pay death claims — when a report made to the insurance department is admissible in evidence against the association — the person receiving the amount need not have an insurable interest in the life of the member.**  
*See* *FREEMAN v. NATIONAL BENEFIT SOCIETY*. . . . . 253

**SUICIDE — Continued.**

PAGE.

— *Provision avoiding an insurance policy in case the assured shall die in the violation of, or the attempt to violate any criminal law — the assured does not violate such a provision by committing suicide — Penal Code, §§ 173, 178.*

*See* DARROW v. FAMILY FUND SOCIETY..... 245

— *Civil Damage act — what evidence will support a verdict that a suicide resulted from intoxication.*

*See* BLATZ v. ROHRBECK..... 402

**SUMMARY PROCEEDINGS:**

*See* LANDLORD AND TENANT

**SUPERVISORS:**

*See* COUNTY.

**SUPPLEMENTARY PROCEEDINGS:**

*See* EXECUTIONS.

**SURETIES** — *Action against sureties upon a general guardian's bond — as to whether it should be brought in the name of the infant or of the guardian — when an action will lie against the sureties on the bond before an accounting has been had by the guardian.*

*See* PERKINS v. STIMMELL..... 520

— *To an undertaking on appeal.*

*See* APPEAL.

*See* PRINCIPAL AND SURETY.

**SURROGATE** — *Proceedings for the sale of the real estate of a decedent to pay his debts — what allegations the petition should contain when made by a creditor.]*

1. On February 16, 1880, these proceedings were instituted by the petitioners to procure an order for the sale of the real estate, owned by one Arnold at the time of his death, for the payment of the petitioners' claim, which was the price of a tombstone or monument sold by them to the administrator of Arnold, in his representative capacity, and erected in memory of the deceased.

*Held*, that as the petition was made by a creditor, and as it stated the facts required by chapter 460 of 1837, as amended by chapter 172 of 1843, and chapter 298 of 1847, it was sufficient; that it was not necessary to set forth therein the facts required by section 8 of chapter 6 of title 4 of part 2 of the Revised Statutes, as that section only applied when the proceedings were instituted by the executor or administrator of the estate.

*MATTER OF LAIRD v. ARNOLD*..... 186

2. — *The cost of a tombstone is to be treated as part of the funeral expenses.]* That the administrator having purchased the monument in his representative capacity, the debt thus created should be regarded as part of the funeral expenses and a charge upon the estate of the decedent. *Id.*

3. — *Costs cannot be allowed by the surrogate until the proceeds of the sale have been paid to the county treasurer.]* The order made in this case directed that out of the proceeds of sale the petitioners should be allowed their costs and expenses, which were adjusted at \$209.88.

*Held*, that the surrogate had no power to consider and determine the question as to whether costs should be awarded to the petitioners, and to fix their amount, prior to the time of the deposit of the proceeds of the sale with the county treasurer and the making of the decree of distribution. *Id.*

4. — *Order opening a decree — how reviewed — Code of Civil Procedure, § 2481, sub. 6.]* In an application made by the relator, for a final accounting by the administrator of one Stevens, the accounts of one of the administrators, Miles, which were the subject of much objection, were referred to a referee, who made a report which was confirmed by the surrogate. Before a final decree was signed, the administrator Miles moved to open the decree upon the ground that he had omitted to credit himself with a large sum, which had been paid to one of the relators. The surrogate permitted him to file a supplemental account, and referred the same back to the referee to hear and determine the question arising upon the account, and to report back the testimony. Thereupon the relators applied for a writ of *mandamus*, commanding the surrogate to forthwith make and sign the decree.

*Held*, that the application was properly denied.

**SURROGATE** — *Continued.*

PAGE.

That the order of the surrogate was reviewable by appeal, and that the case was not one in which the writ should be issued.

PEOPLE EX REL. STEVENS v. LOTT..... 408

— *Payments made by an administrator to an infant will not be allowed — when an equitable claim for supplies and necessities furnished to the infant will be recognized — the surrogate's court has the power to allow such a claim — sales from a trustee to infant beneficiaries will not be sustained.*

See HYLAND v. BAXTER..... 9

— *Reference of disputed claims against an estate — what claims may be passed by the referee — his report, when confirmed, binds the surrogate and can only be reviewed on appeal.*

See MATTER OF GRAY..... 411

— *Jurisdiction of, to order money received by an executor under a policy of insurance on the life of the testator — when the moneys received are assets of the estate.*

See MATTER OF VAN DERMOOR..... 328

— *Letters of administration — when they may be granted without issuing a citation to non-residents — Code of Civil Procedure, § 2662.*

See LIBBEY v. MASON..... 470

**TAXES** — *Exemption of buildings, and the lots on which they stand, of colleges — 1 R. S., 388, § 4, sub. 8, as amended by chap. 397 of 1883.] 1. The policy of this State, as displayed in the laws providing for the exemption from taxation of the property of colleges, incorporated academies and other seminaries of learning, has been from an early day to encourage, foster and protect corporate institutions of religious and literary character, because the religious, moral and intellectual culture afforded by them were deemed, as they are in fact, beneficial to the public, necessary to the advancement of civilization and to the promotion of the welfare of society.*

Although the statute does not in terms prescribe the purposes for which the lot on which the buildings are situated may be used, nor its dimensions, yet a reasonable interpretation thereof requires that the lot be devoted to no use other than that which is necessary or fairly incident to the use and purposes of the institution, and that its dimensions be governed by the reasonable and proper uses to which it is applied, rather than by its magnitude when it is within reasonable limits in that respect.

PEOPLE EX REL., ETC., v. BARBER..... 27

2. — *Grounds for suitable recreation and physical exercise.] That as suitable recreations and physical exercise are deemed requisite to health and successful mental culture, the means and opportunity required for that purpose may properly be provided upon the premises of a literary institution for its students. Id.*

3. — *What use of the ground is consistent with its exemption from tax.] The relator, which was incorporated "to establish and maintain a seminary of learning in the county of Niagara for the care and education of young men," acquired title, as authorized by the acts incorporating it, to a tract of land on the east side of and adjacent to the Niagara river, in the town of Lewiston, extending back from the river about one mile, and being in width about one-half mile, containing, exclusive of a highway and of the lands of a railroad company which runs northerly and southerly through the premises, about 294 8-100 acres. The buildings are near the west end of the farm, and consist of a college building, a chapel and other buildings occupied as a tailor shop for repairing the clothes of the professors and pupils, a shop for repairing their shoes, a music and band-room and some sleeping-rooms, a laundry, a wood-house and bake shop, a carpenter's shop, a machine shop, a gas-house, a boiler-room and some dwellings. The buildings are occupied and used and the business is carried on for the benefit and purposes of the institution and the teachers and students of the college. There is also a cemetery and an apple orchard on the premises.*

The land farther east is used for raising vegetables, grain, hay and for pasturage; horses being kept for the purpose of working the land and upwards of thirty cows to supply milk and butter. The teachers and

## TAXES—Continued.

PAGE.

students are furnished by the corporation with board, and their washing and mending is done for them, the students being charged therefor. All the products of the farm are used upon the premises to supply those engaged there as teachers, students and servants.

*Held*, that as the farm on which the college building is situated was used for the maintenance of the college and in support of its efficiency in aid of education, and seemed to be wholly devoted to the purpose of the institution, and as its extent did not seem to be unreasonably great, the whole tract of land was entitled to be exempted from taxation under the provisions of subdivision 3 of section 4 of 1 Revised Statutes, 888, as amended by chapter 897 of 1883. *Id.*

4. — *Duty of assessors in entering property omitted from the roll of last year.*] It seems, that in entering land upon the assessment-rolls for an omitted tax of the preceding year the assessors can exercise no discretion. Their powers and duties being, in this respect, merely ministerial, they can do no more than to enter the same valuation as that of the year before. *Id.*

5. — *Assessment for personal property — when all the estate may be assessed against one of several executors.*] Upon the hearing of an application to correct an assessment of \$375,000 for personal property, made by the commissioners of taxes of the city of New York against the relator, John Duer and Julia Hallgarten, as executors of the estate of Adolph Hallgarten, it was shown that the relator resided in the city of New York; that John Duer resided in the county of Richmond, and that Julia Hallgarten resided in Germany; that part of the property of the estate consisted of railroad bonds, registered in the names of all three executors, and of bonds and mortgages taken in their names, and of bonds registered in the name of the deceased, all of which were deposited in a safe deposit vault, in a box or safe, rented by said deceased during his lifetime and still standing in his name, though the rent had, since his death, been paid by his executors. The commissioners corrected the roll by striking out the names of the two executors not residing in the city of New York, leaving an assessment for the full amount as against the relator.

*Held*, that the property was in the possession of the relator, or under his control as executor or trustee, within the meaning of section 5 of 1 Revised Statutes (6th ed.), 984, and that an assessment for the full value thereof was properly imposed upon him. *PEOPLE EX REL. NEUSTADT v. COLEMAN*..... 581

6. — *Power of the commissioners of taxes in New York city to correct erroneous assessments — 1882, chap. 410, § 820.*] That, under the power conferred upon the commissioners by section 820 of chapter 410 of 1882, to cause an assessment which is, in their judgment, erroneous, to be corrected, and to fix the amount of such assessment as they believe to be just, they were authorized to strike out the names of the non-resident executors upon the hearing of the application. *Id.*

7. — *Power of the court to do so on the hearing of a certiorari to review them — Code of Civil Procedure, § 2141.*] That, if the commissioners had not made this correction, this court could have made it, under the power conferred by section 2141 of the Code of Civil Procedure upon the hearing of the certiorari. *Id.*

8. — *Tax collector — effect of his failure to give a bond as required by section 24 of chapter 567 of 1875.*] A warrant for the collection of school taxes was, on December 11, 1882, placed in the hands of the defendant, who had, in the previous October, been duly elected collector of taxes. At the time he received the warrant he had not been notified to give a bond, nor had the amount thereof been fixed by the school meeting or the trustee, as required by section 24 of chapter 567 of 1875. The defendant posted the statutory notice to the taxpayers to make voluntary payment within two weeks, and personally demanded payment of them within the life of the warrant; the plaintiff refused to pay the tax assessed against him, which amounted to one dollar and twelve cents. Upon the expiration of the warrant it was, on January 24, 1883, duly renewed by the trustee. On the next day the defendant gave his bond to the trustee and then again demanded payment of the plaintiff, and upon his refusing to pay levied upon a wagon belonging

**TAXES — Continued.**

PAGE.

to him and thereafter sold it, without having again posted the statutory notices giving the taxpayers time for voluntary payment.

*Held*, that so much of the statute as required a bond to be given by the collector was mandatory, but that the provision prescribing the time within which this should be done was directory only. *DUNTLEY v. DAVIS*..... 229

9. — *When his acts done under the warrant are rendered valid by the subsequent giving of the bond.*] That in the absence of any evidence that the taxpayer or the public were prejudiced by the failure of the defendant to give the bond at the time prescribed by law, and inasmuch as abuses did not seem likely to arise or to be favored by so holding, public policy required the court to hold that upon the filing of his bond by the collector all his acts done under the warrant before the levy and sale were validated. *Id.*

10. — *Exemption of moneys deposited by a non-resident for investment here* — 1 R. S. 889, § 5, as amended by chap. 176 of 1851, and 1 R. S. 419, § 3.] One William Maden, who resided in Cuba, died in August, 1884, having at that time on deposit with Moses Taylor & Co., of the city of New York, the sum of \$100,224, which had been placed by him in their custody for investment. The relator, who had duly qualified as his executor in Cuba, in order to get possession of the money so deposited, took out ancillary letters in this State, and thereafter demanded the money from Taylor & Co., who refused to pay it over.

Upon the hearing upon the return to a *certiorari*, brought to review the action of the respondents, in assessing the relator for the sum mentioned as personal property:

*Held*, that as the fund was sent here for investment by the deceased, and his will showed that it was his intention that a certain portion thereof, at least, should be invested in United States securities, it was exempt from taxation under the provisions of section 5 of 1 Revised Statutes, page 889, as amended by chapter 176 of 1851, and section 3 of 1 Revised Statutes, 419.

PEOPLE EX REL. FERRER v. COMMISSIONERS ..... 560

**TAXPAYER** — *In what cases an action to restrain illegal acts will lie by a taxpayer under chapter 531 of 1881.*

*See* STARIN v. MAYOR, ETC. .... 549

**TEACHER** — *Action by.*

*See* SCHOOLS.

**TENANT:**

*See* LANDLORD AND TENANT.

**TENDER** — *Sufficiency of.*

*See* SOHOONMAKER v. KELLY..... 399

**TESTAMENTARY GUARDIAN:**

*See* GUARDIAN AND WARD.

**TITLE** — *When a title is objectionable so that a purchaser will not be compelled to accept it.*

*See* VENDOR AND PURCHASER

**TOMBSTONE** — *The cost of a tombstone is to be treated as part of the funeral expenses.*

*See* MATTER OF LAIRD v. ARNOLD..... 186

**TORT:**

*See* NEGLIGENCE.

**TOWNS** — *Highways in.*

*See* HIGHWAYS.

**TRIAL** — *As to which party has the affirmation of the issue.*] In this action, brought upon a bond dated January 24, 1881, given to a sheriff to indemnify him from all damages and costs that might be incurred, by reason of a levy and sale made by him, the answer did not admit the delivery of the bond.

*Held*, that as the plaintiff was bound to prove this fact, he had the affirmative of the issue. *BENEDICT v. PENFIELD*..... 176

**TRIAL** — *Continued.*

PAGE.

— *Error in the charge of the court as to the measure of damages — an exception thereto will not be sustained when the charge was based upon a fact the existence of which was assumed by the court and both parties upon the trial.*

*See* VAIL v. REYNOLDS..... 647

— *Place of.*

*See* VENUE.

**TRUSTS** — *Action to reach the surplus income of a trust fund — the habits and ability of the cestui que trust are to be considered in determining the amount to be allowed to him for his maintenance.*]

1. Where a judgment creditor seeks to compel so much of the income of a cestui que trust, as exceeds what is necessary for his suitable support and maintenance, to be applied to the payment of his debt, the court in determining what is a proper amount to be allowed for the expenditures of the cestui que trust, will consider the manner in which he has been brought up, the habits acquired by him, and his ability to take care of his property. KILBOY v. WOOD..... 686

2. — *The plaintiff must prove that there is a surplus.*] To entitle the plaintiff to succeed in such an action he must prove that there is a surplus of income, and where he fails so to do his complaint will be dismissed. *Id.*

— *Payments made by an administrator to an infant will not be allowed — when an equitable claim for supplies and necessities furnished to the infant will be recognized — the Surrogate's Court has power to allow such a claim — sales from a trustee to infant beneficiaries will not be sustained.*

*See* HYLAND v. BAXTER..... 9

— *Of corporations.*

*See* CORPORATIONS.

**ULTRA VIRES :**

*See* CORPORATIONS.

**UNCERTAINTY** — *Of covenants or conditions.*

*See* CONTRACTS.

**UNDERGROUND RAILROAD.**

*See* RAILROAD.

**UNDERTAKING** — *On appeal — failure of sureties to justify.*

*See* APPEAL.

*See* BOND.

**UNITED STATES STATUTE** — 1841, chap. 9 — *Sale by assignees in bankruptcy under the United States Statute, chapter 9 of 1841 — power of the court to order a private sale without specifying the time thereof.*

*See* GIGNOUX v. STAFFORD..... 426

**USAGE** — *Evidence of a custom, as to the manner in which other persons conduct their business, is not admissible in favor of a defendant sued for negligently conducting his business.*]

1. In February, 1884, the plaintiff, who was walking on the west side of Louisiana street, in the city of Buffalo, turned, when opposite to the north side of Mackinaw street, to cross to the other side of Louisiana street. When he had nearly reached the curb-stone, on the easterly side of Louisiana street, he was hit by a board which had been blown from a lumber pile which was owned by the defendants, who were engaged in the lumber business, their yards being on the west side of Louisiana street.

Upon the trial of this action, brought to recover damages for the personal injuries sustained by the plaintiff, evidence was given tending to show that the lumber piles in the defendants' yard, when originally completed, were bound or tied down by boards crossing the top and hooked by means of clasps lower down upon the pile so that the boards upon the top of the pile could not blow away; that the pile from which the board in question came had some days before been broken into and a portion thereof had been drawn away, and that the pile had been left without again being tied or fastened.

**USAGE — Continued.**

PAGE.

The defendants called a number of lumbermen doing business in the city of Buffalo, and were allowed, against the objection and exception of the plaintiff, to prove by them that it was the common custom, in lumber yards in that city, where a pile was once opened and was being used, not to again fasten the lumber down. The court charged that the jury had the right to take into consideration the evidence given by these witnesses, to help them to satisfy their minds and form their judgments as to what was, in that business, care and prudence.

*Held*, that the court erred in admitting the evidence and in so charging.

That the question of negligence was one for the jury, under the circumstances of the case, and did not depend upon the custom of persons engaged in a like business. *WRIGHT v. BOLLER*..... 77

2. — *Rule of law not changed by* | A rule of law cannot be changed by any local custom. *Id.*

**USE AND OCCUPATION** — *Right of one tenant in common against his co-tenant.*

See JOINT TENANCY.

**VENDOR AND PURCHASER** — *Executory contract for the sale of land — when it is terminated by a conveyance of the fee of the land, to a stranger, by the vendor.* 1. This action was brought by the plaintiff to recover money paid by her to the defendant under an executory contract for the purchase of land owned by him, upon the ground that after she had made several payments and at a time when she was not in default, the defendant had sold and conveyed the premises to one Hill, who had knowledge of the existence of the contract of sale.

*Held*, that the defendant by conveying the fee of the land to Hill terminated the contract, and that as the plaintiff had up to that time in all respects performed the agreement on her part, she was at liberty to bring this action to recover the money so paid. *SMITH v. ROGERS*..... 110

2. — *Tender.* | That it was not necessary that she should offer to pay the balance of the purchase-money and demand a deed of the premises, as the defendant had put it out of his power to perform the contract on his part. *Id.*

3. — *Remedy against the purchaser.* | That she was not prevented from bringing this action by the fact that Hill knew of the contract at the time he took the deed, and that the plaintiff might have enforced a specific performance of the contract against him. *Id.*

4. — *Contract for the sale of real estate — an objection to the title, based on a decision of the General Term of the Supreme Court, will relieve the purchaser from accepting the title.* | The court will not compel one, who has entered into a contract for the purchase of real estate, to specifically perform his contract when his refusal to complete the purchase is based upon an objection which is sustained by a decision of the General Term of this court.

So long as no adverse decision has been made by a controlling authority, such an objection cannot be considered captious or unreasonable.

*FERRIS v. PLUMMER*..... 440

— *Easement — a purchaser of a servient tenement is not bound by an easement not disclosed by deeds or apparent use.*

See *TAYLOR v. MILLARD*..... 363

— *Sale by assignees in bankruptcy under the United States statute, chapter 9 of 1841 — power of the court to order a private sale without specifying the time thereof.*

See *GIGNOUX v. STAFFORD*..... 426

— *Sale of chattels.*

See SALES.

**VENUE** — *Place of trial of an action to set aside as fraudulent a general assignment covering real estate — the right to demand a change of venue cannot be defeated by an offer by the plaintiff to stipulate not to attempt to reach the real estate.* | A motion to change the place of trial of an action, brought to

**VENUE**— *Continued.*

PAGE.

set aside an assignment for the benefit of creditors on the ground that it was made to hinder, delay and defraud the assignors' creditors, to the county in which certain real estate passing under the assignment is situated, cannot be defeated by an offer on the part of the plaintiff to stipulate that he will not attempt to reach the real estate of the assignors, assigned to the assignee or make any claim of title or interest therein or thereto.

WYATT v. BROOKS..... 503

**VERDICT**— *When a verdict will not be set aside because of the admission of irrelevant evidence.*

See BENEDICT v. PENFIELD..... 176

**VESSELS:**

See SHIPPING.

**VOTE**— *Right of an inmate in a soldiers or sailors' home to vote.*

See DOMICILE.

**WAIVER**— *Contract for the sale of iron—right of the purchaser to reject such as is not of the quality specified—when the examination is not required to be made at the place of shipment—when the purchaser may accept part and reject the remainder of the iron delivered—when he may reject iron not loaded on the vessel at the port specified in the contract.*

See PIERSON v. CROOKS..... 571

— *Motion to dismiss an appeal to the County Court because of a failure of the sureties upon an undertaking to justify—the right to so move is not lost by the service of a notice of retainer or of trial.*

See SLATTERY v. HASKIN..... 56

— *Election—a devisee, by electing to take under a will, waives a right to enforce a claim inconsistent with its other provisions.*

See HAACK v. WEICKEN..... 486

**WARRANTY**— *In contracts of sale of personal property.*

See SALES.

**WIFE:**

See HUSBAND AND WIFE.

**WILL**— *Power of a testator to provide that a bequest shall, in case of the death of the legatee before the death of the testator, go as directed in a will then or thereafter to be executed by the legatee.]* 1. By his will, dated July 24, 1876, David Piffard directed his executors to sell all his property, real and personal, and after the payment of his debts and funeral expenses he gave and bequeathed one-fifth of the remaining proceeds to his daughter, Sarah Eyre Piffard.

By a codicil dated April 24, 1878, after making changes in the executors named in the will, and confirming it in every respect not modified by the codicil, he added: "I do hereby direct that my said daughters, Sarah Eyre Piffard and Ann Matilda Piffard, named in my said will, shall have power, by their several wills heretofore or hereafter duly made and executed, to dispose of, devise and bequeath the share of my estate devised and bequeathed to them severally in and by my said will, and to that end I direct that such share or shares shall be paid over by my said executors to the executors or trustees named in and by the several wills of my said daughters, in case of the death of them, or either of them, in my lifetime, instead of to my said daughter or daughters; but if my said daughters shall survive me, then such shares shall be paid to them severally as now provided in and by my said will."

By codicils, made in 1878, 1880, 1881 and 1883, in one of which reference was made to the death of his daughter, Sarah Eyre Piffard, slight changes were made, the will being in all other respects in each case confirmed. Sarah Eyre Piffard died on August 26, 1881, leaving a will made on August 31, 1880, by which she disposed of all her property, which will was admitted to probate, and letters testamentary were issued to the persons named by her as executors on September 30, 1881.

David Piffard died in 1883, and his will was duly admitted to probate in that year.



**WILL — Continued.**

PAGE.

*Held*, that the legacy, given to Sarah Eyre Piffard, did not lapse upon her death, and that it should be paid by the executors of the will of David Piffard to her executors. **MATTER OF PIFFARD**..... 84

2. — *When residuary legatees and devisees do not become personally liable for legacies the payment of which is charged on the residuary estate.*] Adam Quackenbush died in June, 1806, leaving a will by which, after providing for the maintenance of his wife during her life, he among other things gave to his daughter Betsey \$200 one year after his decease. All the rest, residue and remainder of his estate, not therein otherwise disposed of, and after the payment of his debts and legacies, he gave, devised and bequeathed to his three sons and to their heirs and assigns forever, after the payment of legacies, which legacies he made a lien on all his real and personal estate until paid and satisfied. The testator left personal property sufficient to pay the debts and legacies, but the sons, who were named as executors, refused to qualify, and the estate was never administered, although the sons took the property and converted it to their own uses.

In 1833 this action was commenced by the plaintiff, to whom Betsey had assigned her claim to the legacy, to enforce the payment thereof by a foreclosure of the lien and a sale of the premises.

*Held*, that the residuary legatees and devisees did not, by accepting and using the property, become personally liable to pay Betsey her legacy.

**QUACKENBUSH v. QUACKENBUSH**..... 329

3. — *Statute of limitations — when the right to foreclose a lien to secure a legacy charged on the property is not barred by it.*] That Betsey's right of action against an administrator of the testator's estate would not be barred, as no judicial settlement had been had.

That any action brought by an administrator of the deceased, if appointed, against the residuary legatees as wrong-doers in converting the personal property would, however, be barred by the statute of limitations.

That Betsey consequently had no remedy other than the lien on the land by which she could collect her legacy.

That her equitable right to foreclose the lien would, under the circumstances of this case, subsist for at least twenty-two years from the death of the deceased.

That the action could be maintained. *Id.*

4. — *What proof of the publication of a will will justify the submission of the question to the jury — no formal statement is necessary.*] Mr. Finigan, having been informed by one Sheridan that Mr. John Jones wished to have him draw his will, called upon Jones and it was agreed that the will should be drawn and executed at seven o'clock in the evening of that day, at which time the witnesses were to be present. On that evening Finigan, Jones, Furlong and Sheridan met, and the will was then drawn from instructions given by Jones and in his presence, and read to him by Finigan. He said it was correct, but would rather have Sheridan read it over to him, which Sheridan then did carefully and slowly. Jones then signed the will, and Finigan said "I will sign it as a witness, and then Mr. Sheridan," to which he answered, "All right;" and when Farley signed it he said, "Put your residence there; don't forget that."

*Held*, in an action of ejectment involving the validity of the defendants' title, acquired under such will, that the court erred in refusing to admit the will in evidence, upon the ground that there was not sufficient evidence of its due execution; that the question as to its due execution should have been submitted to the jury. **JONES v. JONES**..... 563

5. — *What proof as to its execution by the testator will justify its admission to probate.*] The deceased, a clerk in the employment of Sleight & Petty, drew his own will and had it signed by his employers as witnesses. It contained the following attestation clause: "We, the undersigned witnesses, have signed the within in the presence of each other and of the testator, who acknowledged it to be his last will and testament." The memory of the witnesses as to the particulars of the transaction was very imperfect, but both united in declaring that the facts stated in the attestation clause were true, or that they would not have signed it.

*Held*, that the will should be admitted to probate.

**WILL — Continued.**

PAGE.

That it seemed very certain that the signature of the testator was in full view of the witnesses, and that the fair inference was that he signed it in the presence of the witnesses. **MATTER OF HUNT**..... 434

6. — *Acknowledgment and publication.*] That if the will was signed before its attestation by the witnesses, the exhibition of the will, and of the testator's signature attached thereto, and his declaration to the witnesses that it was his last will and testament, and his request to the witnesses to attest the same, were a sufficient acknowledgment of the signature and publication of the will. *Id.*

7. — *When legacies are charged upon real estate.*] The plaintiff's testator, after giving to his wife the use of two rooms of his dwelling-house and also the use of \$10,000, to be paid to her annually during her natural life in lieu of her dower, and to each of four grandchildren the sum of \$4,000, to be paid to each on arriving at the age of twenty-one years, gave and bequeathed "all the rest, residue and remainder of my (his) real and personal estate, goods and chattels of what kind and nature soever," to his only son, Charles. He appointed Charles and two other persons executors, and empowered them to sell all his real estate. The personal estate was never sufficient to satisfy the said gifts and bequests, and some of it was lost by the residuary legatee, Charles White, while acting as executor.

*Held*, that the legacies were charged upon the real estate, and that the sole surviving executor had power to sell the real estate to provide a fund from which to pay them. **ANDERSON v. DAVISON**..... 431

8. — *The right of a devisee to take thereunder is not affected by the fact that he willfully murdered the testator.*] This action was brought to have the will of one Francis B. Palmer, so far as it devised and bequeathed property to the defendant, Elmer E. Palmer, declared void, upon the ground that Elmer E. Palmer willfully murdered the testator in order that he might prevent a revocation of the will and have the immediate enjoyment of the property. It was conceded upon the trial that Francis died of strychnine poison, and that Elmer had been convicted of murder in the second degree for killing him, and been sentenced to the Elmira State Reformatory therefor, where he was then imprisoned.

*Held*, that under the laws of this State Elmer was entitled to take the property devised and bequeathed to him by the will of his grandfather, although he himself willfully murdered him. **PRESTON v. PALMER**..... 388

— *Interest — when allowed on a legacy to a son of the testator, from the time of the latter's death — an executor will be compelled to pay compound interest only in cases of gross delinquency.*

*See* **THORN v. GARNER**..... 507

— *Election — a devisee, by electing to take under a will, waives a right to enforce a claim inconsistent with its other provisions.*

*See* **HAAR v. WEICKEN**..... 486

— *Admissibility of the testimony of counsel as to communications had with a deceased person whose will he drew — Code of Civil Procedure, §§ 835, 836.*

*See* **MATTER OF AUSTIN**..... 516

**WITNESS — Cross-examination to impeach his character — he cannot be asked upon what charge he has been arrested.] Upon the trial of this action, brought to recover damages for an assault and battery alleged to have been committed by the three defendants, one of them, who was called as a witness in behalf of himself and the other defendants, testified on his cross-examination that he had been arrested, but did not know how many years ago. He was then asked, "What was the charge?" the plaintiff's counsel stating that he offered this evidence with reference to the character of the witness. The court, against the objection and exception of the defendants' counsel, allowed the witness to answer and state what the charge was.**

*Held*, that it erred in so doing.

**SMITH v. MULFORD**..... 347

— *Only experts can express an opinion as to genuineness of a signature — 1890, chap. 86 — impeachment of a witness, by proof of contradictory statements.*

*See* **McKAY v. LASHNER**..... 270

**WITNESS** — *Continued.*

PAGE.

— *Admissibility of the testimony of counsel as to communications had with a deceased person whose will he drew* — Code of Civil Procedure, §§ 835, 836.

See MATTER OF AUSTIN..... 516

— *The opinion of a witness, as to who is the person alluded to in a libelous publication is not admissible.*

See PEOPLE v. PARR..... 313

— *When the testimony of a party interested in the result is inadmissible* — Code of Civil Procedure, § 829.

See HILL v. WOOLSEY..... 482

— *What questions may be asked for the purpose of discrediting him.*

See YAGER v. PERSON..... 400

**WRIT** — *Of certiorari.*

See CERTIORARI.

— *Of mandamus.*

See MANDAMUS.

**WRITTEN EVIDENCE** — *Parol evidence to vary.*

See EVIDENCE.

HUN — VOL. XLII 96

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